

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

APPEAL FROM THE UNITED STATES DISTRICT COURT OF DISTRICT OF COLUMBIA

No. **100** **82**

DAVID J. WALLER, JR., AND LEVI E. WALLER, TRUSTEES
UNDER THE LAST WILL AND TESTAMENT OF DAVID J.
WALLER, DECEASED, vs. APPELLANTS

THE TEXAS AND PACIFIC RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT OF DISTRICT OF COLUMBIA
FOR THE UNITED STATES

(23,100)

(25,109)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 826.

DAVID J. WALLER, JR., AND LEVI E. WALLER, TRUSTEES
UNDER THE LAST WILL AND TESTAMENT OF DAVID J.
WALLER, DECEASED, &c., APPELLANTS,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

INDEX.

	Page
Transcript of record from the district court of the United States for the southern district of New York.....	1
Bill of complaint.....	1
Answer	20
Exhibit A—Agreement between New Orleans, Baton Rouge & Vicksburg R. R. Co. and New Orleans Pacific Ry. Co., January 5, 1880.....	48
B—Articles of consolidation, New Orleans Pacific Ry. Co. with Texas and Pacific Ry. Co., June 20, 1881.....	50
Order dismissing bill as to Union Trust Co.....	54
Testimony of Levi E. Waller.....	56
Peter Palmer	56

	Page
Exhibit 2—Mortgage	57
3—Letter of Bloss, attorney, to Delano.....	81
4—Map of diagram of lands.....	82
6—Letter, Commissioner General Land Office.....	83
7—Resolution, board of directors New Orleans, Baton Rouge & Vicksburg Railroad.....	84
8—Letter, Commissioner General Land Office.....	86
9—Telegram from Wheelock.....	88
11—Protest of Geo. W. and Emma O. Cochran.....	89
12—Protest of Bissell.....	90
13—Minutes, stockholders' meeting of New Orleans, Baton Rouge & Vicksburg Railroad Co.....	93
14—Letters from Wheelock to Robertson & Blanchard and reply.....	96
15—Brief, Dillon and Green.....	99
16—Report of Senator Jonas.....	123
17—Affidavit of Grenville Dodge.....	126
19—Letter, Hon. L. E. Payson.....	129
20—Letter, Commissioner General Land Office.....	133
21—Letter, Wheelock, president.....	138
22—Letter, Commissioner General Land Office, May 11.....	139
23—Letter, Commissioner General Land Office, Oct. 15, 1883..	143
24—Letter, Wheelock, with brief of Dillon.....	148
25—Letter, Wheelock to Secretary of Interior.....	159
26—Letter, Ellis and others, with resolution of stockholders, New Orleans Pacific Ry. Co.....	163
27—Letter, chief clerk, Secretary of Interior, to Gould, presi- dent Texas and Pacific Ry. Co.....	168
28—Letter, Satterlee, secretary Texas & Pac. Ry. Co., to chief clerk, Secretary of Interior.....	170
29—Statement, Grenville Dodge and Wheelock, President, to House of Representatives.....	172
32—Decree in case Granger <i>et al.</i>	182
Offers of evidence by defendant.....	206
Exhibit A—Opinion, Attorney General Brewster.....	207
B—Deposition of Alvin E. Hebert.....	219
C—Deed from Baton Rouge R. R. Co. to New Orleans Pac. Ry. Co.	222
E—Letter, Secretary Teller to the President, and indorse- ment by President.....	226
P—Judgment roll from district court for the eastern district of Louisiana in case of Dillon <i>et al. vs.</i> New Orleans, Baton Rouge & Vicksburg R. R. Co.....	231
Bill of complaint.....	231
Exhibit E—Agreement between New Orleans Pacific Ry. Co. and John F. Dillon <i>et al.</i> , April 17, 1883, etc.....	257
F—Agreement between New Orleans Pacific Ry. Co. and John F. Dillon <i>et al.</i> , Janu- ary 5, 1884.....	286
I—List of bonds.....	298
Amended and supplemental bill.....	299

INDEX.

iii

	Page
Decree <i>pro confesso</i>	301
Order dismissing bill of complaint as to Crooks <i>et al.</i>	302
Decree in Ry. Co. <i>vs.</i> Union Trust Co.....	303
Decree in Dillon <i>vs.</i> Ry. Co.....	308
Clerk's certificate	313
Judge's certificate to clerk.....	313
Clerk's certificate to judge.....	314
Testimony of Wm. H. Abrams.....	315
Final decree	319
Assignment of errors.....	321
Order allowing appeal.....	332
Citation	333
Opinion of Evans, judge.....	336
Order as to record.....	345
Stipulation as to record.....	345
Clerk's certificate	346
Opinion, Coxe, J.....	347
Judgment	348
Petition for appeal and allowance.....	348
Assignments of error.....	349
Bond on appeal.....	354
Clerk's certificate	356
Citation and service.....	357



Bill of Complaint.

1

District Court of the United States

**IN AND FOR THE SOUTHERN DISTRICT OF
NEW YORK**

DAVID J. WALLER, JR. and
LEVI E. WALLER, Trustees
under the last Will and Tes-
tament of David J. Waller,
deceased, in their own behalf
and in behalf of all other
bondholders secured by a
Deed of Trust made by the
New Orleans Baton Rouge
and Vicksburg Railroad
Company, dated the 4th day
of September, 1872,

2

Plaintiffs,

AGAINST

THE TEXAS & PACIFIC RAILWAY
COMPANY, NEW ORLEANS
PACIFIC RAILROAD COMPANY
and UNION TRUST COMPANY,
of New York,

3

Defendants.

TO THE HONORABLE THE JUDGES OF THE DISTRICT
COURT OF THE UNITED STATES IN AND FOR THE
SOUTHERN DISTRICT OF NEW YORK :

DAVID J. WALLER, JR. and LEVI E. WALLER, resi-
dents and citizens of the State of Pennsylvania,

- 4 Trustees under the last Will and Testament of David J. Waller, deceased, in their own behalf, as well as in behalf of all other parties, if any there be, holding obligations of the same nature and kind as your orators and who may intervene for their interest herein and contribute to the costs, expenses and counsel fees incurred in this suit, bring this their bill of complaint against The Texas and Pacific Railway Company, a corporation organized under the Laws of Congress, which corporation has and maintains its principal office and domicile in the City and State of New York and District aforesaid; the New Orleans Pacific Rail-
- 5 road Company, a corporation organized under the laws of Louisiana (now owned and controlled by the Texas & Pacific Railway Company) having its office in the City of New York with the Texas & Pacific Railway Company; the Union Trust Company of New York, a corporation organized under the laws of the State of New York, a resident of and a citizen of the State of New York, having its principal domicile in the City and State of New York.

1. That David J. Waller Jr. and Levi E. Waller, as such Trustees, complain and say that the said David J. Waller, a resident and citizen of the State
- 6 of Pennsylvania, departed this life in the year 1893, leaving a last Will and Testament wherein your said orators were named and appointed as Executors and Trustees, and to whom, as trustees, for the purposes mentioned therein, said testator thereby gave all the property, real, personal and mixed, wheresoever and whatsoever the same might be; which said last Will and Testament was duly admitted to proof and execution on the 29th day of December, 1893, in the office of the Registrar of Wills of Columbia County in said State of Pennsylvania, in which proceedings they qualified as such executors and Trustees.

2. That under and pursuant to an Act of the 7
 General Assembly of Louisiana, entitled "An Act
 to Incorporate the New Orleans, Baton Rouge &
 Vicksburg Rail Road Company", approved Decem-
 ber 30th, 1869, the said Railroad Company was duly
 incorporated; that in and by said Act said com-
 pany was authorized and empowered to borrow
 money, from time to time, and to issue its corporate
 bonds or promissory notes, bearing interest, and in
 order to secure the payment of said bonds and notes
 to mortgage its railroads, its capital stock, cor-
 porate franchises, and its real and personal prop-
 erty, or any part thereof, which the company owned
 or was entitled to at the time of executing such 8
 mortgage, or which might thereafter be by said
 company acquired, and the Board of Directors was
 thereby authorized and empowered to dispose of,
 sell and negotiate such bonds or notes, through its
 officers or agent or agents.

3. That the Congress of the United States, by an
 Act entitled "An Act to Incorporate the Texas
 Pacific Railroad Company and to aid in the con-
 struction of its road, and for other purposes", ap-
 proved March 3, 1871, did therein provide, by § 22
 for a grant of lands to the New Orleans Baton
 Rouge & Vicksburg Rail Road Company, as fol- 9
 lows: "there is hereby granted to said company, its
 successors and assigns, the same number of alter-
 nate sections of public lands per mile in the State
 of Louisiana as are by this Act granted in Cali-
 fornia to the said Texas Pacific Railroad Company;
 and said lands shall be withdrawn from market,
 selected, and patents issue therefor upon the same
 terms and in the same manner as is provided for
 and required from said Texas Pacific Railroad
 Company within said State of California, provided
 that the said company complete the whole of said
 road within five years from the passage of this

- 10 Act"; and that thereby there was granted by the United States to the said New Orleans Baton Rouge & Vicksburg Rail Road Company ten alternate sections of land per mile on each side of its railroad on a route to be selected by said company to connect with the Texas Pacific Railroad Company at its eastern terminus through the public land from New Orleans to Baton Rouge and thence, by way of Alexandria, all in the State of Louisiana, to the said eastern terminus of the Texas Pacific Railroad Company; and by said Act the New Orleans Baton Rouge & Vicksburg Rail Road Company was duly empowered to mortgage said grant
 11 and the lands so granted to aid in the construction of its railroad.

4. That on the 4th day of September, 1872, said New Orleans Baton Rouge & Vicksburg Rail Road Company duly executed its certain mortgage or deed of trust to the defendant Union Trust Company of New York, transferring and conveying, among other things, all its railroad and personal property, and particularly all the right, title and interest which said railroad, or its successors, then had or might at any time thereafter acquire or become in any way entitled in and to all the said lands and sections of land and land grant, situate, lying
 12 and being on either side of the said railroad as the same might be finally located and constructed and as granted by and in accordance with the Act of Congress entitled "An Act to Incorporate the Texas & Pacific Railroad Company and to aid in the construction of its road and for other purposes", approved March 3, 1871. A copy of said mortgage or deed of trust is filed herewith. The Union Trust Company of New York appeared by its duly accredited attorney in fact and accepted of record its trusteeship under said mortgage.

5. That, as duly authorized and permitted, said mortgage did and was intended to secure 12,000 bonds of \$1,000 each, payable on the 1st day of September, 1902, with semi-annual interest at the rate of seven per cent. (7%) per annum, of which number only twelve hundred and fifty (1250) of said bonds were issued and certified by the said Trustee. 13

6. That said David J. Waller Jr. and Levi E. Waller, as Trustees, are the lawful owners and holders, before maturity, and for a good and valuable consideration, of thirty (30) of said bonds, which were recognized as valid and subsisting obligations by the Texas and Pacific Railway Company, and are numbered respectively: 14

751,	752,	753,	754,	755,	756,
757,	758,	759,	760,	761,	762,
763,	764,	765,	766,	767,	768,
769,	770,	771,	772,	773,	774,
775,	776,	777,	778	779,	780,

all of like tenor (a copy of which bond is duly filed herewith) with fifty-two (52) coupons attached to each.

8. That in and by said mortgage of September 4, 1872, it was covenanted and agreed by and between said railroad company and the said trustee that a sinking fund be established and maintained and an amount equal to one per cent. of its gross earnings, after certain deductions, and the proceeds of the sales of all of its lands and land grant, granted as aforesaid, be paid to the said trustee for the said fund for the benefit of the bondholders as therein provided. 15

9. That the said mortgage of September 4th, 1872, was duly recorded in the Parish of Orleans

16 in the State of Louisiana on the 4th day of September, 1872, and duly filed and recorded in the office of the Secretary of the Interior at Washington, D. C.

17 10. That the said railroad company accepted said land grant and prior to the execution of the said mortgage of September 4, 1872, and on the 11th day of November, 1871, it duly filed in the Department of the Interior at Washington, D. C., as required by law, a map of the general route of its road from Baton Rouge to Shreveport, and on the 13th day of February, 1873, a like map showing the general route of its road from New Orleans to Baton Rouge; that in the year 1871 and 1873 respectively the lands along said general route within the grant of the Act of March 3, 1871, being the mortgaged premises described in said mortgage, were withdrawn from entry and sale by order of the Secretary of the Interior.

18 11. That under and by the terms of the said land grant, as hereinbefore set forth, there vested in the New Orleans Baton Rouge & Vicksburg Rail Road Company, on the 3rd day of March, 1871, the title to the said lands so granted, as ascertained and determined by its said maps of definite location, subject only to the construction of its said railroad by it or its successors or assigns.

12. That on or before the 5th day of January, 1881, the New Orleans Baton Rouge & Vicksburg Rail Road Company, by its deed of the same date, and in consideration of the sum of one dollar, duly remised, released, quit-claimed and assigned to the said New Orleans Pacific Railroad Company, its successors or assigns, all its right, title and interest in and to said lands and land grants above described and approved March 3, 1871, together with

all and singular the tenements, hereditaments and appurtenances thereunto belonging, or anywise appertaining, and the reversion and reversions, the remainder and remainders, rents, issues and profits thereof, and thereupon and thereafter the said New Orleans Baton Rouge & Vicksburg Rail Road Company no longer continued its separate corporate existence and became merged and consolidated with the said New Orleans Pacific Railroad Company. 19

13. That the said conveyance and its acceptance by said New Orleans Pacific Railroad Company were duly filed in the Interior Department at Washington, D. C., and were duly recognized by the Secretary of the Interior, under an opinion written by the Attorney General of the United States at the request of said Secretary, that the New Orleans Baton Rouge & Vicksburg Rail Road Company had title to said land grant and could sell and assign same as it had done, and that said assignment was valid. After January 5, 1881, the New Orleans Pacific Railroad Company, as the assignee of the New Orleans Baton Rouge & Vicksburg Rail Road Company, constructed two hundred and sixty miles of railroad from Shreveport by way of Alexandria and West Baton Rouge to Whitecastle in the State of Louisiana, and within the limits of the lands withdrawn by the Secretary of the Interior for its said grantor and assignor, and substantially upon the course, direction and general route of the road filed by such grantor. 20 21

14. That on the 13th day of March, 1883, the Secretary of the Interior transmitted to the President of the United States a report in writing of the Commissioner appointed by the President to examine said two hundred and sixty miles of road and recommended that they be accepted and that pat-

22 ents for such lands as might have been earned by their construction be issued to the New Orleans Pacific Railroad Company, as assignee of the said New Orleans Baton Rouge & Vicksburg Rail Road Company, the mortgagor herein, and said recommendation was approved in writing by the President, and on the 3rd day of March, 1885, patents were issued to the said New Orleans Pacific Railroad Company, but solely as the assignee of said New Orleans Baton Rouge & Vicksburg Rail Road Company, and as its grantee, for 679,284.64 acres of the said lands in the State of Louisiana.

23 15. That the facts heretofore alleged with respect to the title of said lands have been determined and adjudged by the Supreme Court of the United States in an action entitled New Orleans Pacific Railroad Company against the United States, reported in 124 United States Reports, page 124.

24 16. That by an Act of Congress of the United States entitled "An Act to declare the forfeiture of Lands granted to the New Orleans Baton Rouge & Vicksburg Rail Road Company; to confirm title to certain lands, and for other purposes", approved February 7, 1887, the title of the United States and of the New Orleans Baton Rouge & Vicksburg Rail Road Company, under said Act of March 3, 1871, so far as by said Act of February 7, 1887, was not declared forfeited, was thereby relinquished, granted, conveyed and conformed to the New Orleans Pacific Railroad Company, as the assignee of the said New Orleans Baton Rouge & Vicksburg Rail Road Company under the said assignment and conveyance of January 5, 1881, being the same lands shown and determined by the said map of definite location filed by the New Orleans Baton Rouge & Vicksburg Rail Road Company on the

11th day of November, 1871, and by the maps filed 25
 by the New Orleans Pacific Railroad Company on
 the 27th day of October, 1881, and the 17th day of
 October, 1882, all covering and including the same
 lands, premises and land grant, excepting thereout
 and forfeiting the lands located by the New Orleans
 Baton Rouge & Vicksburg Rail Road Company
 and the New Orleans Pacific Railroad Company
 on either side of the road from New Orleans to
 Whitecastle in the State of Louisiana, and confirm-
 ing the title as aforesaid to approximately 746,954
 acres within the limits of the said land grant to the
 plaintiff's mortgagor, as appears of record at the
 Interior Department at Washington. 26

17. That at the time Congress passed said Act
 approved February 7, 1887, confirming title to the
 said lands as aforesaid, the New Orleans Pacific
 Railroad Company was and now is consolidated
 with and merged into the defendant The Texas &
 Pacific Railway Company. The Texas & Pacific
 Railway Company was originally incorporated un-
 der the name of the Texas Pacific Railroad Com-
 pany and by Act of Congress, entitled "An Act
 Supplementary to an Act entitled 'An Act to In-
 corporate the Texas Pacific Railroad Company and
 to aid in the construction of its road and for other
 purposes', approved March 3, 1871", and itself 27
 approved May 2, 1872, was changed to The Texas
 & Pacific Railway Company.

18. That within six months after the said assign-
 ment and conveyance of the land grant aforesaid
 by the New Orleans Baton Rouge & Vicksburg Rail
 Road Company to the New Orleans Pacific Rail-
 road Company, the New Orleans Pacific Railroad
 Company, on the 20th day of June, 1881, granted,
 transferred and assigned to the Texas & Pacific
 Railway Company all of its property, both real and

- 28 personal, together with its franchise and railroad and its entire capital stock, with the object and intent to merge the New Orleans Pacific Railroad Company with the Texas & Pacific Railway Company under the latter's name. That by the terms of said instrument the land and land grant acquired by the New Orleans Pacific Railroad Company, as assignee of the New Orleans Baton Rouge & Vicksburg Rail Road Company, were expressly reserved unto the New Orleans Pacific Railroad Company; and also provided that the corporate organization of the New Orleans Pacific Railroad Company was to be continued and maintained until further authorized corporate action.
- 29

19. That in addition to the lands patented to the amount of 679,284.64 acres to the New Orleans Pacific Railroad Company, as the assignee of the mortgagor herein, there has been patented to the said company further and other of the said lands included in the said land grant known as Patents Nos. 5 and 6 respectively, and further and additional lands have been patented unto the said railroad company, amounting in all, in the year 1907, to 1,001,000 acres; that the said New Orleans Pacific Railroad Company has since procured further patents for lands and from time to time files applications for additional lands, and still continue so to do; the records of the Secretary of the Interior showing that there is a balance still due of more than 1,000,000 acres under the land grant to the New Orleans Baton Rouge & Vicksburg Rail Road Company.

30

20. That in and by said Act of Congress entitled "An Act to Incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes", approved March 3, 1871, wherein and whereby the defendant Texas & Pa-

eific Railroad Company was incorporated, it was 31
 provided that the rights, lands, land grants, fran-
 chises, privileges and appurtenances and property
 of every description belonging to each of the con-
 solidated or purchased railroad company or com-
 panies, as herein provided, shall vest in and become
 absolutely the property of the Texas & Pacific Rail-
 way Company, provided that in all contracts made
 and entered into by said company with any and all
 other railroad company or companies to effect such
 aforesaid consolidation or purchase, the indebted-
 ness or other legal obligations of the said company
 or companies shall be assumed by The Texas &
 Pacific Railway Company as may be agreed upon, 32
 and no such consolidation or purchase shall impair
 any lien which may exist on any railroads so con-
 solidated or purchased; that pursuant to said Act
 the Texas & Pacific Railway Company was em-
 powered to purchase the stock, land grant, fran-
 chises and appurtenances of and consolidate on
 such terms as might be agreed upon, but not with
 any competing railroad, and the contracts and obli-
 gations of such railroad companies so consolidated
 were made first liens upon the property granted and
 transferred to the Texas & Pacific Railway Com-
 pany.

21. That the defendant The Texas & Pacific Rail- 33
 way Company owned and controlled the New Or-
 leans Pacific Railroad Company from about the
 time of its organization, and by its ownership of its
 capital stock now owns and controls the said com-
 pany, which has no separate or independent exist-
 ence or corporate organization except through The
 Texas & Pacific Railway Company, and that pur-
 suant to the said agreement of June 20, 1881, and
 said consolidation, and by virtue of the said Act of
 its incorporation last mentioned, The Texas &
 Pacific Railway Company did assume and become

- 34 liable for all the contracts and obligations of the said New Orleans Pacific Railroad Company which by virtue of its consolidation with the New Orleans Baton Rouge & Vicksburg Rail Road Company, and as its assignee and grantee of the said lands and the land grant to the said mortgagor company, and by accepting the said lands and land grant charged with the lien of the said mortgage of September 4, 1872, and with notice thereof, did assume and become liable for the contracts and obligations of the said New Orleans Baton Rouge & Vicksburg Rail Road Company, and particularly the performance of the covenants contained in the said mortgage and the payment of the said bonds secured thereby.
- 35

22. That the organization of the above named companies and the merger and consolidation thereof into the Texas & Pacific Railway Company, and transfer of said land grant, were all part of a scheme, by the same parties, to secure from the United States, these lands for the purpose of raising money thereon by mortgages and bonds secured thereby, to construct, equip a transcontinental railway from New Orleans to the Pacific, as appears from said Act approved March 3, 1871.

- 36 23. That the lands patented in the name of the New Orleans Pacific Railroad Company are appropriated by the defendant The Texas & Pacific Railway Company, which continues the corporate existence of the said New Orleans Pacific Railroad Company in name only and for the sole purpose of its receiving said patents of lands under the said grant and the selling thereof, the proceeds thereof being appropriated by the defendant The Texas & Pacific Railway company to its own use, by virtue of its ownership of its entire capital stock; and the Texas & Pacific Railway Company also has in its possession or within

its control the corporate books and books of account 37
and records of the New Orleans Pacific Railroad
Company and the New Orleans Baton Rouge &
Vicksburg Rail Road Company, which maintain no
separate corporate existence, and, as the plaintiff
are informed and believe, have no officers or direc-
tors.

24. That the defendant The Texas & Pacific Rail-
way Company, either directly or by and through its
ownership of the New Orleans Pacific Railroad
Company and the New Orleans Baton Rouge &
Vicksburg Rail Road Company, and with full
knowledge of the terms and covenants contained 38
in said mortgage of September 4, 1872, and in viola-
tion thereof and the trust therein created, has
diverted the proceeds from the sales of the said
lands from the uses and purposes in said mortgage
provided, and, in fraud of the plaintiffs and the
holders of bonds secured by said mortgage it has
appropriated said moneys arising from such sales
to its own use and to the use of the New Orleans
Pacific Railroad Company, and to other uses un-
authorized by said deed of trust.

25. That the defendant Union Trust Company of
New York, in and by the terms of the said trust, 39
which it duly accepted as aforesaid, did covenant
and agree with the said mortgagor railroad com-
pany to establish and maintain a sinking fund as
in said deed of trust provided, wherein was to be
paid by the said mortgagor and collected and re-
ceived by the said trustee, among other things, the
proceeds of the sales of the mortgaged premises or
any part thereof.

26. That the defendant New Orleans Pacific
Railroad Company, as assignee of the New Orleans
Baton Rouge & Vicksburg Rail Road Company, has

- 40 been and now is receiving Patents from the Government of the United States of and to large portions of the mortgaged premises, included in said land grant, exceeding in the aggregate, in the year 1907, 1,001,000 acres, and in breach of the said provisions of the trust and in fraud of the rights of the bondholders secured thereby, has sold said lands to many and divers persons; and that The Texas & Pacific Railway Company, through its merger and consolidation with the New Orleans Pacific Railroad Company, the assignee of the said mortgagor, as aforesaid, through its ownership of the entire capital stock of the New Orleans Pacific Railroad
- 41 Company, has received, diverted and appropriated to itself, or to other purposes unauthorized, and in breach of the terms of said trust, the proceeds of such sales; and said Union Trust Company, of New York, in breach of its duties as trustee under the said trust, and with actual or constructive notice of such sales and conveyances of the said lands and the misappropriation of the proceeds thereof, has wholly failed in its duty as such trustee and acquiesced in the misappropriation of said proceeds. By such sales these mortgaged premises have come into the hands or possession and occupation of many and divers persons, whose number is
- 42 so great that it is wholly impracticable to enforce the lien of said mortgage, and who by occupation under the color of title acquired an impregnable title thereto.

27. That the defendant Union Trust Company, of New York, was made a party defendant in an action brought by John F. Dillon and Henry M. Alexander, Trustees, against New Orleans Baton Rouge & Vicksburg Rail Road Company, Union Trust Company, Everett H. Carter, John B. Crooks, Edward Lander and Albert H. Leonard, in the United States Circuit Court for the Eastern Dis-

trict of Louisiana, and duly served with process 43 therein, and a bill of complaint, alleging that the plaintiffs, as trustees under the deeds of trust dated respectively April 17, 1883, and January 5, 1884, made and executed by the New Orleans Pacific Railroad Company, held first liens upon the mortgaged premises to secure an issue of bonds authorized thereby, and asked for judgment that the deed of trust dated September 4, 1872, made by the New Orleans Baton Rouge & Vicksburg Rail Road Company to the defendant Union Trust Company, did not effect or give any lien in or to the mortgaged premises, and that the same be cancelled, and was cancelled upon a *pro confesso* decree. 44

28. And upon information and belief, that the same attorneys, while pretending to act only for the complainants in said cause, were also attorneys for the New Orleans Pacific Railroad Company, and for the defendant Union Trust Company. The New Orleans, Baton Rouge & Vicksburg Rail Road Company appeared by attorney nominated by and in the interests of the said complainants and The Texas & Pacific Railway Company, but made no defense; and the defendant the Union Trust Company wholly failed to appear, answer or demur in the said cause, in disobedience to a subpœna duly served upon them, and in disobedience of the order 45 made by the said court with respect to the said Union Trust Company, which order, dated the 1st day of April, 1890, recited that the defendant New Orleans Pacific Railroad Company was in possession of the mortgaged premises, and directed the Union Trust Company to appear, plead, answer or demur by the first Monday of May, 1890, and further directed the service of said order, together with the process of subpœna, to be made by the Marshal for the Southern District of New York. Thereafter the said subpœna and order were duly

- 46 served upon the defendant Union Trust Company by the said marshal, on the 7th day of April, 1890, at its office in the City of New York, upon Edward King, the President of the Union Trust Company.

29. That the New Orleans Pacific Railroad Company and the Texas & Pacific Railway Company, pursuant to a plan having for its purpose the cancellation of the lien of said mortgage or deed of trust of September 4, 1872, and the appropriation of the proceeds of the mortgaged premises by the New Orleans Pacific Railroad Company and The Texas & Pacific Railway Company free from the
- 47 lien of said mortgage, the said Union Trust Company aiding and acquiescing, wholly disobeyed and ignored the requirements of said order, and thereby became in default, at which time said Union Trust Company was the grantee of said lands of great value, and said Trustee was empowered in and by said mortgage to sell and convey said lands, or any part thereof, and receive the proceeds thereof. The other defendants Carter, Leonard, Crooks and Lander, appeared and filed their bills therein, and thereafter and on the 16th day of November, 1891, said attorneys for the complainants in said cause obtained an *ex parte* order therein dismissing said action against the said bondholders
- 48 Crooks, Lander, Carter and Leonard, and on the same day, viz.: the 16th day of November, 1891, a decree *pro confesso* was made and entered in said Court on motion of the said attorneys for the complainants and against the said defendant Union Trust Company, declaring the said mortgage or deed of trust made by the New Orleans Baton Rouge & Vicksburg Rail Road Company to its said trustee, dated September 4, 1872, invalid and that no lien thereby attached to the said mortgaged premises, which were the lands granted to said mortgagor by Congress by Act approved March 3,

1871, and the said mortgage by the terms of said 49
decree was thereupon cancelled.

30. That in and by the bill of complaint in the last described action, the said complainants therein alleged and represented that of the total issue of 12,000 bonds, authorized by the said trust deed of September 4, 1872, they then hold 1183 thereof, which fact was wholly false and untrue and known by the complainants so to be, the said Trust Company, having at that time certified and issued only 1250 of the said bonds, the balance thereof never having been issued, and that there was outstanding, at that time, at least the bonds held by the 50
plaintiffs herein, the bonds held by the bondholders who were parties to the said action, and certain other bonds, aggregating at least 150 bonds. The Union Trust Company, though in duty bound as trustee, to defend the said action, and the trust created by the said mortgage, failed so to do, and permitted the destruction of the lien created by the said mortgage, and permitted the New Orleans Pacific Railroad Company and the Texas & Pacific Railway Company to appropriate to themselves, or to other purposes, in violation of said deed of trust, the proceeds arising from the sales of said lands, whereby and solely by reason of the wrongful 51
acts of the defendant trust company and the Texas & Pacific Railway Company, the security afforded by said mortgage to the bondholders secured thereby has been wholly lost to the plaintiffs.

32. That the plaintiffs are informed and verily believe that the lands hereinbefore mentioned and described contained in the said land grant to the New Orleans Baton Rouge & Vicksburg Rail Road Company, were of great value and worth at least five dollars per acre.

52 33. That the subject matter involved in this cause exceeds the sum of Three thousand dollars.

34. That by reason of the acts of the defendants, hereinbefore alleged, the plaintiffs are wholly without remedy at law.

WHEREFORE the plaintiffs demand judgment

FIRST: That the Union Trust Company, The Texas & Pacific Railway Company and the New Orleans Pacific Railroad Company discover all the lands patented, contained in the said land grant to the New Orleans, Baton Rouge & Vicksburg Rail
53 Road Company, patented by the United States to the New Orleans Pacific Railroad Company; all sales of the lands so patented and the moneys and security or other property paid or given in exchange therefor, together with all the rents, issues and profits derived from said lands, and all moneys paid out of such proceeds, the time when, person or corporation to whom, and the purpose for which the said moneys have been paid; and that the Union Trust Company and the Texas & Pacific Railway Company account to the plaintiffs herein and to all other bondholders similarly situated, for all such moneys and property received or derived from
54 the enjoyment and sales of said mortgaged premises to the extent of their bonds and coupons and interest thereon. And the complainants pray that the amount due them for their bonds and coupons and interest thereon be ascertained and determined, and the defendants Union Trust Company, of New York, and The Texas & Pacific Railway Company be decreed to pay complainants respectively the amounts so found to be due them.

May it please your Honors to grant to your orators writs of subpoena, under the seal of this Honorable Court, to be directed to the Union Trust Company of the City of New York, The Texas &

Pacific Railway Company of the City of New York, 55
 commanding them and each of them, at a certain
 time and under certain penalty, to appear before
 this Honorable Court and full, true and perfect
 answer make to the premises, under oath, and to
 perform or abide by such further orders and de-
 crees as this Honorable Court shall deem meet;
 and for an order to such defendants, as to whom it
 may be necessary to make such order, for them to
 appear, plead and answer, or demur herein, by a
 certain day to be fixed; and may it please your
 Honors to further direct that service of process and
 all such orders be made on such defendants accord-
 ing to law.

56

And your orators pray for all general relief.

KING & OSBORN,
 Attorneys for Plaintiffs,
 165 Broadway,
 Borough of Manhattan,
 New York City, N. Y.

UNITED STATES OF AMERICA }
 Southern District of New York } ss:

LEVI E. WALLER, being duly sworn, says: that he
 is one of the plaintiffs in the above entitled action;
 that he has read the foregoing complaint and knows
 the contents thereof; that the same is true of his 57
 own knowledge, except as to the matters therein
 stated to be alleged on information and belief, and
 that as to those matters, he believes it to be true.

Sworn to before me this 6th }
 day of May, 1913. } LEVI E. WALLER

ALICE W. PARSONS
 Notary Public Kings Co.
 Cert. filed in N. Y. Co.

58 DISTRICT COURT OF THE UNITED STATES
IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

59 DAVID J. WALLER, JR., and LEVI
E. WALLER, Trustees under
the last Will and Testament
of David J. Waller, deceased,
in their own behalf and in
behalf of all other bond-
holders secured by a Deed of
Trust made by the New
Orleans Baton Rouge and
Vicksburg Rail Road Com-
pany dated the 4th day of
September, 1872, } R. 10-209.
Plaintiffs,
AGAINST
THE TEXAS & PACIFIC RAIL-
WAY COMPANY, NEW ORLEANS
PACIFIC RAILROAD COMPANY
and UNION TRUST COMPANY,
of New York,
60 Defendants.

**Answer of Defendant, the Texas and
Pacific Railway Company.**

The Texas and Pacific Railway Company, one of
the defendants above named, having heretofore duly
appeared herein by Pierce & Greer, its attorneys,
for its answer to the bill of complaint denies the
preliminary allegations that it owns and controls
the New Orleans Pacific Railway Company and
that said Company has its office in the City of New

York with this defendant, and further shows and 61
alleges as follows:

FIRST. This defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 1 of the bill of complaint.

SECOND. This defendant upon information and belief admits that the New Orleans, Baton Rouge and Vicksburg Railroad Company was incorporated under and pursuant to an act of the General Assembly of Louisiana approved December 30, 1869; but denies that the powers conferred upon said corporation by said act are *correctly* summarized in Paragraph 2 of the bill of complaint. 62

THIRD. This defendant admits that the 22nd section of the Act of Congress of the United States entitled "An Act to Incorporate The Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March 3, 1871, provided for a grant of lands to the New Orleans, Baton Rouge & Vicksburg Railroad Company; but denies that the provisions of said act and the legal effect thereof are correctly quoted, summarized and alleged in Paragraph 3 of the bill of complaint. 63

FOURTH. This defendant upon information and belief admits that on or about the 4th day of September, 1872, an instrument was executed, purporting to be a mortgage or deed of trust of the New Orleans, Baton Rouge & Vicksburg Railroad Company to the Union Trust Company of New York, covering its railroad and personal property; but denies all of the other allegations of Paragraph 4 of the bill of complaint excepting that it denies that it has any knowledge or information sufficient to form a belief as to whether the document filed

- 64 with the bill of complaint herein is a true and correct copy of the said alleged mortgage or deed of trust.

FIFTH. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 5 of the bill of complaint.

- 65 SIXTH. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 6 of the bill of complaint, except that it denies that the instruments alleged to be owned and held by the plaintiffs were ever recognized by this defendant as valid and subsisting obligations.

SEVENTH. This defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 8 of the bill of complaint.

EIGHTH. This defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 9 of the bill of complaint.

- 66 NINTH. This defendant upon information and belief denies the allegations contained in Paragraph 10 of the bill of complaint, except that it admits that on or about the 11th day of November, 1871, and 13th day of February, 1873, certain maps were filed in the Department of the Interior at Washington, D. C., by the New Orleans, Baton Rouge & Vicksburg Railroad Company, indicating the general route of its projected line of railroad from New Orleans to Baton Rouge.

TENTH. This defendant upon information and belief denies the allegations contained in Paragraph 11 of the bill of complaint.

ELEVENTH. Answering Paragraph 12 of the bill 67
of complaint, this defendant denies all of the allegations contained in said paragraph, except that (1)
it admits that on or about the 5th day of January, 1881, the New Orleans, Baton Rouge & Vicksburg Railroad Company executed and delivered an instrument whereby and wherein it is recited that said railroad company, as the party of the first part to said instrument, for and in consideration of the sum of One Dollar, lawful money of the United States of America, to it in hand paid by the New Orleans Pacific Railway Company, as party of the second part to said instrument, at or before the en-
sealing and delivery thereof, the receipt whereof 68
was thereby acknowledged, and of other good and valuable consideration, remised, released and quit-claimed unto the New Orleans Pacific Railway Company and to its successors and assigns forever, all of the right, title and interest of the New Orleans, Baton Rouge & Vicksburg Railroad Company, its successors and assigns, of, in or to a certain grant of public lands granted to said New Orleans, Baton Rouge & Vicksburg Railroad Company by the Act of the Congress of the United States approved March 3, 1871, and entitled "An Act to Incorporate The Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," together with all and
singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and (2) denies that it has any knowledge or information sufficient to form a belief as to whether or not the New Orleans, Baton Rouge & Vicksburg Railroad Company preserved its corporate existence after the execution of said instrument. A true copy of said instrument as filed in the Depart- 69

70 ment of the Interior at Washington, D. C., is hereto annexed and made a part hereof, Marked Exhibit A.

71 TWELFTH. This defendant upon information and belief denies the allegations contained in paragraph 13 of the bill of complaint, except that it admits that the assignment executed by the New Orleans, Baton Rouge & Vicksburg Railroad Company under date of January 5, 1881, was filed in the office of the Secretary of the Interior, and admits that the New Orleans Pacific Railway Company constructed two hundred and sixty miles of railroad, from Shreveport by way of Alexandria and West Baton Rouge to Whitecastle, in the State of Louisiana, and except, further, that it has no knowledge or information sufficient to form a belief as to whether the road so constructed was within the limits of lands previously withdrawn by the Secretary of the Interior for the New Orleans, Baton Rouge & Vicksburg Railroad Company and substantially upon the course, direction and general route of any projected road filed by said last named company.

72 THIRTEENTH. Answering Paragraph 14 of the bill of complaint this defendant admits that on or about the 13th day of March, 1883, the Secretary of the Interior transmitted to the President of the United States a report in writing of a commission appointed by the President to examine certain sections of railroad constructed or owned by the New Orleans Pacific Railway Company, and recommended that the same be accepted and that patents for such of said lands as might have been earned by the construction of said railroad be issued to the New Orleans Pacific Railway Company as assignee of the rights granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company by the 22nd section of the Act of Congress of March 3, 1871, hereinbefore referred to, which

said recommendation was subsequently approved 73
by the President of the United States; and further
admits that on or about March 3, 1885, patents
were issued in conformity with such recommenda-
tion; but this defendant denies that it has any
knowledge or information sufficient to form a
belief as to the other allegations contained in said
Paragraph.

FOURTEENTH. This Defendant upon information
and belief denies the allegations contained in Para-
graph 15 of the bill of complaint.

FIFTEENTH. This defendant denies upon in- 74
formation and belief all of the allegations con-
tained in Paragraph 16 of the bill of complaint,
except that it admits that by an Act of the Con-
gress of the United States entitled "An Act to
declare the forfeiture of lands granted to the New
Orleans, Baton Rouge & Vicksburg Railroad Com-
pany, to confirm title to certain lands, and for
other purposes," approved February 7, 1887, the
title of the United States and of the New Orleans,
Baton Rouge & Vicksburg Railroad Company to
certain lands under said Act of March 3, 1871, so
far as by said act of February 7, 1887, was not de-
clared forfeited, was thereby relinquished, granted, 75
conveyed and confirmed to the New Orleans Pacific
Railway Company as the assignee of the New
Orleans, Baton Rouge & Vicksburg Railroad Com-
pany, and except that it admits, upon information
and belief, that said lands were indicated by maps
of definite location filed by the New Orleans Pacific
Railway Company on or about October 27, 1881,
and November 17, 1882.

SIXTEENTH. This defendant admits the allega-
tions contained in Paragraph 17 of the bill of
complaint, except that it denies that the New Or-

76 leans Pacific Railway Company was ever consolidated with and merged into this defendant, and avers in that behalf that on or about the 20th day of June, 1881, under and by virtue of certain articles of consolidation executed by the New Orleans Pacific Railway Company and this defendant, certain of the franchises and properties of the New Orleans Pacific Railway Company were acquired by and transferred to this defendant.

77 SEVENTEENTH. This defendant denies that the terms of the indenture dated June 20, 1881, between the New Orleans Pacific Railway Company and this defendant are fully and accurately stated in Paragraph 18 of the bill of complaint, and for a full and accurate statement thereof this defendant prays leave to refer to a true copy of said instrument which is annexed hereto and made a part hereof, marked Exhibit B.

78 EIGHTEENTH. This defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 19 of the bill of complaint, except that it admits that patents numbers "Five" and "Six" were issued by the United States to the New Orleans Pacific Railway Company.

NINETEENTH. This defendant admits that the Act of Congress of the United States entitled "An Act to Incorporate The Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March 3, 1871, provided that this defendant might acquire the franchises and properties of other companies by consolidation or otherwise, as therein provided; but denies that the provisions of said act in that behalf are correctly summarized in Paragraph 20 of the bill of complaint.

TWENTIETH. This defendant denies the allegation contained in Paragraph 21 of the bill of complaint. 79

TWENTY-FIRST. This defendant denies the allegations contained in Paragraph 22 of the bill of complaint.

TWENTY-SECOND. This defendant denies the allegations contained in Paragraph 23 of the bill of complaint, except that it denies that it has any knowledge or information sufficient to form a belief as to whether the New Orleans, Baton Rouge & Vicksburg Railroad Company ceased to maintain a separate corporate existence, and had no officers or directors, after the transactions referred to in said Paragraph. 80

TWENTY-THIRD. This defendant denies the allegations contained in Paragraph 24 of the bill of complaint.

TWENTY-FOURTH. This defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 25 of the bill of complaint.

TWENTY-FIFTH. Answering Paragraph 26 of the bill of complaint this defendant denies that through any merger or consolidation with the New Orleans Pacific Railway Company or through ownership of the entire capital stock of the New Orleans Pacific Railway Company it has received, diverted, or appropriated to itself or to any other purpose, in breach of the terms of any trust, the proceeds of sale of any of the lands referred to in said paragraph; and this defendant denies that it has any knowledge or information sufficient to form a belief as to the other allegations contained in said paragraph. 81

- 82 TWENTY-SIXTH. This defendant upon information and belief admits the allegations contained in Paragraph 27 of the bill of complaint.

- TWENTY-SEVENTH. Answering Paragraph 28 of the bill of complaint this defendant admits upon information and belief that the provisions of the order for service of a subpoena upon the Union Trust Company, dated April 1, 1890 and entered in the cause referred to in said paragraph, wherein the Union Trust Company is defendant, are stated with substantial accuracy therein; and admits that such subpoena and order were duly served upon said
- 83 Trust Company by the Marshal for the Southern District of New York on or about the 7th day of April, 1890, as shown by said Marshal's return; but denies that it has any knowledge or information sufficient to form a belief as to any of the other allegations contained in said paragraph, except that the allegation that the attorney appearing in said cause on behalf of the New Orleans, Baton Rouge & Vicksburg Railroad Company was nominated by and in the interests of this defendant, which allegation this defendant denies.

- TWENTY-EIGHTH. This defendant denies the allegations contained in Paragraph 29 of the bill of complaint, except that it admits that of the defendants named in the bill of complaint of John F. Dillon and Henry M. Alexander, Trustees, referred to in said paragraph, the defendants Carter, Leonard, Crooks and Lander appeared and filed pleadings therein, and that thereafter, and on or about the 16th day of November, 1891, the attorneys for the said Complainants obtained an *ex parte* order therein, dismissing the action against the defendants Crooks, Lander, Carter and Leonard, and on the same day, to-wit, the 16th day of November, 1891, a decree *pro confesso* was made
- 84

and entered in said cause, on motion of the attorneys for the complainants and against the defendants the Union Trust Company, New Orleans Pacific Railway Company and New Orleans, Baton Rouge & Vicksburg Railroad Company, declaring and adjudging, among other things, that the instrument, purporting to be a mortgage or deed of trust, executed by the New Orleans, Baton Rouge & Vicksburg Railroad Company to the Union Trust Company of New York under date of September 3, 1872, was inoperative as a lien upon lands granted by the 22nd section of the act approved March 3, 1871, incorporating this defendant. 85

TWENTY-NINTH. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 30 of the bill of complaint, except that it admits upon information and belief that John F. Dillon and Henry M. Alexander alleged in the bill of complaint referred to in said paragraph that they were the owners of 1183 of the bonds issued under said alleged mortgage or deed of trust of the New Orleans, Baton Rouge & Vicksburg Railroad Company dated September 4, 1872, and except that it denies upon information and belief that the decree entered in the suit referred to in said paragraph destroyed any lien upon the lands granted by the 22nd section of the Act of March 3, 1871, or in any way affected the security afforded to the holders of bonds issued under said alleged mortgage or deed of trust of the New Orleans, Baton Rouge & Vicksburg Railroad Company dated September 4, 1872. 86 87

THIRTIETH. This defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 32 of the bill of complaint.

88 **THIRTY-FIRST.** This defendant admits the allegations contained in Paragraph 33 of the bill of complaint.

THIRTY-SECOND. This defendant denies the allegations contained in Paragraph 34 of the bill of complaint.

FIRST AFFIRMATIVE DEFENSE TO THE CAUSE OF ACTION ATTEMPTED TO BE ALLEGED AND SET FORTH IN THE BILL OF COMPLAINT.

 For a first affirmative defense to the cause of action attempted to be alleged and set forth in the
89 bill of complaint this defendant further shows and alleges, upon information and belief, as follows:

THIRTY-THIRD. (a) The New Orleans, Baton Rouge & Vicksburg Railroad Company, referred to from time to time in the bill of complaint herein, was organized and created under and by virtue of an act of the General Assembly of the State of Louisiana approved December 30, 1869, entitled "An Act to Incorporate the New Orleans, Baton Rouge & Vicksburg Railroad Company and to expedite the construction of their road," with the power, among others, to lay out, locate, construct,
90 equip and thereafter to own, maintain, operate and enjoy a continuous single or double track railway from any point on the line of the New Orleans, Jackson & Great Northern Railroad within the Parish of Livingston, running thence to any point on the boundary line dividing the States of Louisiana and Mississippi, over such route as the company may deem most direct and practicable, with a view of continuing and completing said railroad to the City of Vicksburg in the State of Mississippi; and to lay out, construct and equip and thereafter to own, maintain, operate and enjoy a single or double track branch railway from such point on

its main line as the company shall determine to the City of Baton Rouge, and such other branches as the company may deem proper from their main line to other points on the Mississippi River within the State of Louisiana. Reference is hereby made to each and all of the provisions of said act of the General Assembly of Louisiana for a complete and accurate statement of the powers thereby conferred upon said Railroad Company, said act being made a part of this answer to the same extent as if herein set forth and incorporated at length. 91

(b) Subsequently, and on or about the 3rd day of March, 1871, this defendant was incorporated by an Act of the Congress of the United States approved on said date and entitled "An Act to Incorporate The Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," with the power, among others, to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, County of Harrison, State of Texas; thence by the most direct and eligible route, to be determined by it, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by it, through New Mexico and Arizona to a point on the Rio Colorado, at or near the southeastern boundary of the State of California; thence by the most direct and eligible route from San Diego, California, to Ship's Channel in the Bay of San Diego, in the State of California. By the 22nd section of said act of Congress it was provided "that the New Orleans, Baton Rouge and Vicksburg Railroad Company chartered by the State of Louisiana, shall have the right to connect by the most eligible route to be selected by said company with the said Texas Pacific Railroad at 92 93

94 its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria in said State to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California, to said Texas Pacific Railroad Company; and said lands shall be withdrawn
95 from market, selected, and patents issued therefor, and opened for settlement and preemption, upon the same terms and in the same manner and time, as is provided for and required from said Texas Pacific Railroad Company, within said State of California; Provided, That said Company shall complete the whole of said road within five years from the passage of this Act." Reference is hereby made to each and all of the provisions of said Act of Congress approved March 3, 1871, for a complete and accurate statement of the terms of said land grant, the conditions thereof and the obligations of the grantee thereunder, its successors and
96 assigns, said act being made a part of this answer to the same extent as if herein set forth and incorporated at length. Subsequently, and on various dates, maps were filed in the office of the Department of the Interior of the United States, by or on behalf of said New Orleans, Baton Rouge & Vicksburg Railroad Company, indicating the general route of its projected railroad to connect with the line of this defendant at its eastern terminus, but no definite location of such railroad was ever made by said railroad company and no railroad was ever constructed by it as contemplated by said Act of Congress.

(c) On or about the 4th day of September, 1872, 97
 one Calvin H. Allen, representing himself to be
 the president of said New Orleans, Baton Rouge
 & Vicksburg Railroad Company and assuming to
 act under the authority of said company, by an act
 before T. J. Beck, a notary public in the City of
 New Orleans, made and executed a certain instru-
 ment purporting to be a mortgage or deed of trust
 of said Company, to secure an intended issue of
 mortgage bonds, certain of which bonds thereafter
 were issued and a part of which bonds so issued,
 if now outstanding, are those claimed to be owned
 by the plaintiffs herein. By the terms of said in-
 strument and particularly the granting clause 98
 thereof, said New Orleans, Baton Rouge & Vicks-
 burg Railroad Company, although having no
 power, under its charter or under the laws of the
 State of Louisiana, to mortgage or hypothecate
 after-acquired property (excepting such as might be
 appurtenant to and to be used in connection with
 a railroad constructed or to be constructed), and
 having no power, under its charter or under the
 laws of the State of Louisiana, to mortgage or
 hypothecate property, excepting such as should be
 definitely described and susceptible of definite
 location by reference to the instrument of mort-
 gage or hypothecation, and having at the date of 99
 said mortgage failed to make any definite location
 of its proposed railroad and being in default in the
 construction of any part of its railroad (no con-
 struction work ever having been undertaken), at-
 tempted to include in the mortgaged premises "all
 the right, title, interest, claim, estate or demand
 whatsoever which the said railroad company or
 its successors now has or may at any time here-
 after acquire, or become in any way entitled to,
 of, in and to all the lands and sections of land
 situate, lying and being on either side of the said
 railroad, as the same may be finally located and

100 constructed, in accordance with and as granted by
the act of Congress entitled 'An Act to Incorporate
The Texas Pacific Railroad Company, and to aid
in the construction of its road, and for other pur-
poses,' approved March 3, 1871." At the date of
the attempted execution of said mortgage, by the
Constitution of the State of Louisiana, (such con-
stitutional provision having been re-adopted under
the Constitution of 1879 and having thereafter
continued in full force and effect) it was provided
that no mortgage or privilege should affect the pur-
chasers of real estate unless recorded in the parish
in which the property to be effected was situated;
101 and by the laws of the State of Louisiana in force
and effect at the date of the execution of said
mortgage, and in full force and effect during all
the times mentioned in the complaint herein, it
was further provided that no mortgage upon real
estate should be effective after the expiration of
ten years from the date of original recordation
unless reinscribed upon the records in the office of
its original recordation. Notwithstanding the
foregoing constitutional and statutory provisions
of the State of Louisiana the said alleged mort-
gage or deed of trust of September 4, 1872, was,
if recorded at all, recorded in the Parish of
Orleans alone (none of the lands referred to in
the bill of complaint herein being located in said
parish), and was never reinscribed, as required by
102 the laws of the State of Louisiana.

(d) The New Orleans Pacific Railway Company,
referred to from time to time in the bill of com-
plaint herein, was organized under notarial cer-
tificate, and subsequently, and on or about the 19th
day of February, 1876, the General Assembly of the
State of Louisiana adopted an Act entitled "An
Act to confirm the Notarial Charter of the New
Orleans Pacific Railway Company, to extend the

term of existence of said company and to confer 103
thereon certain powers and franchises," said corporation being empowered, among other things, to locate, construct, lease, own and use a railroad with one or more tracks and suitable turnouts, of such gauge and construction and upon such a course or route as may be deemed by a majority of the directors of said company most expedient, beginning at a point on the Mississippi River at New Orleans, or between New Orleans and the parish of Iberville, on the right bank of the Mississippi, and Baton Rouge on the left bank, or from New Orleans or Berwick's Bay, via Vermillionville, in the parish of Lafayette, and Opelousas, in the 104
parish of St. Landry, or from any of said points, or from any point within the limits of this State, and running thence toward and to the City of Shreveport or the City of Marshall or Dallas, in the State of Texas, in such direction and route or routes as said company shall fix, and with such connecting branches in the State of Louisiana as may be deemed proper, such being the general route of the then projected railroad of the said New Orleans, Baton Rouge & Vicksburg Railroad Company. Reference is hereby made to each and all of the provisions of said act of the General Assembly for a complete and accurate statement of 105
the powers thereby conferred upon said Railway Company, said act being made a part of this answer to the same extent as if herein set forth and incorporated at length.

(c) On or about the 5th day of January, 1881, while in default in the definite location as well as the construction of any part of the railroad contemplated by the 22nd section of said Act of Congress approved March 3, 1871, hereinbefore recited, the New Orleans, Baton Rouge & Vicksburg Railroad Company, by an instrument in writing, re-

- 106 mised, released and quit-claimed unto the said New Orleans Pacific Railway Company, its successors and assigns forever, all the right, title and interest of said first named company, its successors and assigns, of, in or to the grant of public lands granted to said first named company by the said Act of Congress approved March 3, 1871, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof. The said instrument, together with proper evidence of its acceptance by the New Orleans Pacific Railway Company was filed in the office of the Department of the Interior of the United States (a copy whereof is hereto annexed and made a part hereof as Exhibit A). Under and by virtue of said instrument, if and to the extent that the same was effective, the New Orleans Pacific Railway Company succeeded to the privilege originally conferred upon said New Orleans, Baton Rouge & Vicksburg Railroad Company, subject to the right in the United States of America to enforce a forfeiture thereof for any existing or subsequent breach of the conditions of the grant.
- 107
- 108 (f) Subsequently, and on or about the 27th day of October, 1881, and the 17th day of November, 1882, the New Orleans Pacific Railway Company, in order to definitely locate its line of railroad as contemplated by the provisions of the Act of Congress approved March 3, 1871, hereinbefore mentioned, and thereby acquire inchoate title to specific sections of the public lands opposite to and conterminous with such railroad, filed in the office of the Department of the Interior of the United States certain maps, whereby the location of such railroad was for the first time definitely indicated. From time to time thereafter the said New Orleans

Pacific Railway Company constructed or acquired 109
 certain portions of the railroad definitely located
 by the aforesaid maps, and, in respect to said con-
 structed mileage of railroad, made application to
 the Secretary of the Interior of the United States
 for the issuance to it, as the lawful assignee of the
 New Orleans, Baton Rouge & Vicksburg Railroad
 Company, of patents for such of the lands as it
 had earned by the construction or acquisition of
 the railroad contemplated by said Act of March 3,
 1871. Subsequently, and on or about the 13th day
 of March, 1883, the Secretary of the Interior of
 the United States addressed to the President of the
 United States a recommendation that the applica- 110
 tion so made by the New Orleans Pacific Railway
 Company be granted, and on the same date the
 recommendation so made was approved by the
 President of the United States. Thereafter patents
 for certain lands, bearing numbers "One", "Two",
 "Three" and "Four", were executed on behalf of
 the United States of America by Chester A. Arthur,
 its President, and issued to the New Orleans Pacific
 Railway Company under date of March 3, 1885.
 Subsequently, and on or about the 8th day of Feb-
 ruary, 1887, at which time the New Orleans, Baton
 Rouge and Vicksburg Railroad Company was, as
 aforesaid, in default in the definite location or con- 111
 struction of any part of the railroad contemplated
 by said Act of March 3, 1871, and the New Orleans
 Pacific Railway Company, although it had defi-
 nitely located and partially constructed, or acquired
 the line of railroad contemplated by said Act of
 March 3, 1871, was in default in the construction
 of the whole of said road within the period con-
 ditioned by the act, the Congress of the United
 States, by its act approved on the day aforesaid,
 enacted that the lands granted to the New Orleans,
 Baton Rouge & Vicksburg Railroad Company by
 said act approved March 3, 1871, be declared to be

112 forfeited to the United States of America in all that part of the grant which is situated on the east side of the Mississippi River and which is opposite to and conterminous with the part of the New Orleans Pacific Railway Company which was completed on the 5th day of January, 1881, and that said lands be restored to the public domain of the United States, and further enacted as follows:

113 "That the title of the United States and of the original grantee to the lands granted by said act of Congress of March 3, 1871, to said grantee, the New Orleans, Baton Rouge and Vicksburg Railroad Company, not herein declared forfeited, is relinquished, granted, conveyed and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, said lands to be located in accordance with the map filed by said New Orleans Pacific Railway Company in the Department of the Interior October twenty-seventh, 1881, and November 17, 1882, which indicates the definite location of said road: *Provided*, That all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in the possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States."

114

Reference is made to each and all of the provisions of said Act of Congress approved February 8, 1887, for a complete and accurate statement of all of the provisions thereof, said act being made a part of this answer to the same extent as if herein set forth and incorporated at length. Subse-

quently patents numbers "Five" and "Six" were 115
executed on behalf of the United States by Benjamin Harrison, its President, under date of August 8, 1889, and patent number "Seven" was executed on behalf of the United States by its said President under date of November 8, 1889, all of which patents, together with those previously issued, conveyed to the New Orleans Pacific Railway Company lands earned by it under the said Act of March 3, 1871, or confirmed and relinquished to it under and by virtue of said Act of February 8, 1887; and from time to time other lands were selected and became due to the New Orleans Pacific Railway Company under and by virtue of said Act 116
of March 3, 1871, and said Act of February 8, 1887, all of which lands patented and selected were acquired and confirmed to the New Orleans Pacific Railway Company free from any lien attempted to be imposed thereon by the New Orleans, Baton Rouge and Vicksburg Railroad Company, and the equity of said New Orleans Pacific Railway Company to have and to hold the same is superior to any claim or equity of said New Orleans, Baton Rouge & Vicksburg Railway Company and especially to any claim under the aforesaid instrument purporting to be a mortgage or deed of trust of the New Orleans, Baton Rouge & Vicksburg Railroad 117
Company, dated September 4, 1872.

SECOND AFFIRMATIVE DEFENSE TO THE CAUSE OF ACTION ATTEMPTED TO BE ALLEGED AND SET FORTH IN THE BILL OF COMPLAINT.

For a second affirmative defense to the cause of action attempted to be alleged and set forth in the bill of complaint this defendant further shows and alleges, upon information and belief, as follows:

THIRTY-FOURTH. (a) On or about the third day of March, 1890, John F. Dillon and Henry M.

- 118 Alexander, grantees or mortgagees under mortgages executed by the New Orleans Pacific Railway Company dated respectively April 17, 1883 and January 5, 1884, and covering, as a first lien thereon, the lands acquired or to be acquired by said New Orleans Pacific Railway Company pursuant to the 22nd section of the Act of Congress approved March 3, 1871, incorporating this defendant, brought suit in the Circuit Court of the United States in and for the Fifth Judicial Circuit and the Eastern District of Louisiana against the New Orleans Pacific Railway Company, the New Orleans, Baton Rouge & Vicksburg Railroad Company, the Union Trust Company of New York, and certain individual defendants, alleging in their bill of complaint, among other things, that the New Orleans, Baton Rouge & Vicksburg Railroad Company never made any definite location of its railroad and never constructed any part of the same; that the railway contemplated by the 22nd section of the Act of Congress approved March 3, 1871 (Chapter 112) was constructed at great expense by the New Orleans Pacific Railway Company and in part by the issue and use of its bonds secured by its mortgages dated April 17, 1883, and January 5, 1884, executed to said John F. Dillon and Henry M. Alexander, the complainants in said cause; that the lands granted by the 22nd section of said Act of Congress of March 3, 1871, were confirmed to the said New Orleans Pacific Railway Company by the Act of Congress of February 8, 1887 (Chapter 120); that the said mortgages made to the said Dillon and Alexander, complainants in said cause, constituted a valid and first lien upon all of the lands granted by said Act of 1871, and confirmed by said Act of 1887, and that the mortgage made on behalf of the New Orleans, Baton Rouge & Vicksburg Railroad Company by Calvin H. Allen, appearing as its President before T. J. Beck,

Notary, of New Orleans, on September 4, 1872, to the Union Trust Company of New York, did not cover, attach to, mortgage, hypothecate or affect the lands patented by the United States to the New Orleans Pacific Railway Company on March 3, 1885, under the Act of Congress of March 3, 1871 (Chapter 122), or any part thereof, or any of the lands patented to the New Orleans Pacific Railway Company on March 3, 1885, under said Acts of 1871 and 1887 or selected or due under said laws, and created no lien thereon or right in or to the same or any part thereof. The said bill of complaint was amended under and by virtue of a pleading designated as an amended and supplemental bill and filed March 18, 1890, but not as to any of the allegations above recited.

(b) On or about the 1st day of April, 1890, service of a subpoena within the Eastern District of Louisiana having been made upon the New Orleans Pacific Railway Company as defendant in the above named action, the solicitors for said Dillon and Alexander, as complainants therein, suggested the allegations of the bill of complaint and the amended bill, and that the Union Trust Company of New York, one of the defendants, was not an inhabitant of the Eastern District of Louisiana nor found therein, nor had appeared in the cause, but had its domicile and office in the City of New York, and that the suit was one to remove an incumbrance, lien and cloud from the real property within the said district as well as within the Western District of Louisiana, as set forth in the bill of complaint; and it then appearing that the New Orleans Pacific Railway Company, one of the defendants, was in possession of the said real estate and had been duly served with process at New Orleans by subpoena therein, it was ordered that the Union Trust Company appear and plead, an-

124 answer or demur in the cause first mentioned, in May, 1890, and that such order be served on the said Union Trust Company at its office in New York City, New York, such service, together with service of process of subpœna, to be made by the Marshal of the United States for the Southern District of New York, in which district the said office was situated. Subsequently, and on or about April 15, 1890, the United States Marshal for the Southern District of New York filed in said cause his return of said order, wherein he certified that on the 7th day of April, 1890, at the City of New York, in the Southern District of New York, he
 125 had personally served the above-described order to plead and process of subpœna upon the Union Trust Company, by exhibiting to Edward King, president of said company, the original order and subpœna, and at the same time leaving certified copies thereof.

(c) On or about the 14th day of October, 1890, the solicitors for said Dillon and Alexander, as complainants therein, suggested that process of subpœna had been duly issued and served in the cause, according to law and the orders of the Court, on the New Orleans Pacific Railway Company and
 126 the Union Trust Company of New York, the defendants therein, but that no appearances had been made therein by said defendants or either of them, and that the New Orleans, Baton Rouge & Vicksburg Railroad Company appeared therein on the 25th day of April, 1890, but had not filed any demurrer, plea or answer, or other pleading, and that the time limited for said defendants to so plead had long since expired; whereupon it was ordered that the bill of complaint be taken *pro confesso* against said defendants and each of them. Subsequently, and on or about the 16th day of November, 1891, pursuant to the said order, a de-

decree was entered and filed in said cause, whereby 127
 it was ordered, adjudged and decreed that the New
 Orleans, Baton Rouge & Vicksburg Railroad Com-
 pany never made any definite location of its rail-
 road and never constructed any part of the same;
 that the railway contemplated by the 22nd section
 of the Act of Congress of March 3, 1871 (Chapter
 122) was constructed at great expense by the New
 Orleans Pacific Railway Company and in part by
 the issue and use of its bonds secured by its mort-
 gages of April 17, 1883, and January 5, 1884,
 executed to John F. Dillon and Henry M. Alex-
 ander, the complainants in said cause; that the
 lands granted by the 22nd section of the Act of 128
 Congress of March 3, 1871, were confirmed to the
 said New Orleans Pacific Railway Company by
 the Act of Congress of February 8, 1887 (Chapter
 120); that the said mortgages made to said Dillon
 and Alexander constituted a valid and first lien on
 all the lands granted by said Act of 1871 and con-
 firmed by said Act of 1887, and that the mortgage
 made on behalf of the New Orleans, Baton Rouge
 & Vicksburg Railroad Company by Calvin H. Allen,
 appearing as its President before T. J. Beck, No-
 tary, of New Orleans, September 4, 1872, to the
 Union Trust Company of New York, did not and
 does not attach to, mortgage, hypothecate or affect 129
 the lands patented by the United States to the
 New Orleans Pacific Railway Company March 3,
 1885, under said Act of Congress of March 3, 1871
 (Chapter 122), or any part thereof, or any of the
 lands patented to the said New Orleans Pacific
 Railway Company on March 3, 1885, under said
 acts of 1871 and 1887, or selected or due under
 said laws, and creates no lien thereon or right in
 or to the same or any part thereof.

The aforesaid decree of said Circuit Court of the
 United States in and for the Fifth Judicial Circuit
 and the Eastern District of Louisiana continued to

130 be and now is in full force and effect, and by reason thereof the Union Trust Company of New York and the holders of any and all bonds issued and outstanding under the said alleged mortgage or deed of trust of September 4, 1872, referred to in said decree (including the plaintiffs in this cause), are estopped and barred from asserting either against the New Orleans Pacific Railway Company or through the New Orleans Pacific Railway Company and against this defendant any of the matters and things adjudged by said decree and hereinbefore recited, and the said decree is a bar to the present attempted action against this defendant
 131 and to the prosecution thereof.

THIRD AFFIRMATIVE DEFENSE TO THE CAUSE OF ACTION ATTEMPTED TO BE ALLEGED AND SET FORTH IN THE BILL OF COMPLAINT.

For a third affirmative defense to the cause of action attempted to be alleged and set forth in the bill of complaint this defendant further shows and alleges, upon information and belief, as follows:

THIRTY-FIFTH: On or about the 20th day of June, 1881, the New Orleans Pacific Railway Company entered into an agreement and indenture, dated
 132 on said date, wherein and whereby, for the considerations therein stated, it consolidated itself with this defendant, by granting, bargaining, selling, aliening, remising, releasing, conveying and confirming unto this defendant, its successors and assigns, all the franchises, corporate rights and privileges of said railway company, together with its track, roadbed, buildings, rolling stock, engineer's tools, bonds, stocks, grants, privileges, property (real and personal), and every right, title and interest in and to any franchise or property (real or personal), and all rights of every name and kind in which said railway company had any right,

privilege or interest, situate or being in the State 133
 of Louisiana or elsewhere, or in the State of Texas
 or elsewhere, with the object and intent to so
 merge the rights, powers and privileges of said
 New Orleans Pacific Railway Company into this
 defendant that this defendant, under its own char-
 ter, corporate name and organization, should,
 without impairing any existing right, exercise, in
 addition thereto, all the powers, rights, privileges
 and franchises and own and control all the prop-
 erties that said railway company then exercised
 and owned, or by its charter and by-laws had the
 right to exercise, own or control; provided, how-
 ever, that the land and land grants, acquired or 134
 to be acquired by said New Orleans Pacific Rail-
 way Company from the Government of the United
 States, either directly or indirectly, or from the
 State of Louisiana, or from the New Orleans, Baton
 Rouge & Vicksburg Railroad Company, or from
 any other source, other than lands necessary and
 needful for railroad purposes, should be exempted
 and excluded from the provisions of the contract
 and should not, by the terms and provisions thereof,
 pass to this defendant; and it was further pro-
 vided, in and by said agreement and indenture,
 that this defendant should receive from the New
 Orleans Pacific Railway Company, or its share- 135
 holders, share for share of its capital stock of \$100
 per share, issued or to be issued (not exceeding
 the rate of \$20,000 per mile) for four hundred
 miles of road which it was estimated would be con-
 structed under the existing franchise of the New
 Orleans Pacific Railway Company; and it was
 also further provided in and by said agreement and
 indenture that the stock received by this defendant
 thereunder was not to be cancelled, but was to be
 held and used by it for the purpose of preserving
 to this defendant the enjoyment of all rights and
 privileges pertaining to the ownership thereof,

- 136 and, unless otherwise provided, by authorized corporate action, the corporate existence of the New Orleans Pacific Railway Company was to be maintained and its power to carry out all existing contracts and to mortgage all land and land grants it had acquired or might acquire from the New Orleans, Baton Rouge & Vicksburg Railroad Company was to remain wholly unimpaired. From time to time this defendant received shares of capital stock of the New Orleans Pacific Railway Company under the provisions of the agreement and indenture above recited, issuing in exchange therefor an equivalent par amount of the shares
- 137 of its own capital stock; but the shares so delivered to this defendant constituted a part only of the capital stock of said New Orleans Pacific Railway Company, the balance thereof being outstanding in the hands of the public and being held by persons unknown to this defendant. Upon the execution of the indenture hereinbefore recited this defendant entered into the possession of all of the properties conveyed to it thereby, but did not enter upon or take possession of, or in any way exercise dominion over, any land or land grants acquired or to be acquired by the New Orleans Pacific Railway Company from the Government of the United States, either directly or
- 138 indirectly, or from the State of Louisiana, or from the New Orleans, Baton Rouge & Vicksburg Railroad Company, or from any other source, other than lands necessary and needful for railway purposes; and since the date of the execution of said agreement and indenture this defendant has held or occupied no relation to said New Orleans Pacific Railway Company or to the land and land grants owned by it and referred to in the bill of complaint herein, other than as owner and holder as aforesaid of a certain part of the outstanding capital stock of said railway Company.

FOURTH AFFIRMATIVE DEFENSE TO THE CAUSE OF ACTION ATTEMPTED TO BE ALLEGED AND SET FORTH IN THE BILL OF COMPLAINT. 139

For a fourth affirmative defense to the cause of action attempted to be alleged and set forth in the bill of complaint this defendant further shows and alleges, upon information and belief, as follows:

THIRTY-SIXTH: The plaintiffs and their predecessors in title to the bonds upon which this cause is attempted to be founded have made no timely and diligent effort to question the transactions referred to in the complaint herein or the title of the New Orleans Pacific Railway Company or its grantees to the lands granted by the 22nd section of the Act of Congress approved March 3, 1871, and are guilty of such lack of diligence and of such laches in the premises that no complaint may now be made in respect of said bonds or the matters and things referred to in the bill of complaint herein. 140

FIFTH AFFIRMATIVE DEFENSE TO THE CAUSE OF ACTION ATTEMPTED TO BE ALLEGED AND SET FORTH IN THE BILL OF COMPLAINT.

For a fifth affirmative defense to the cause of action attempted to be alleged and set forth in the bill of complaint this defendant further shows and alleges, upon information and belief, as follows: 141

THIRTY-SEVENTH: That it appears upon the face of the bill of complaint that the bill of complaint is without equity and does not state facts sufficient to constitute a cause of action or causes of action against this defendant or to entitle the plaintiffs to any decree against this defendant.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By PIERCE & GREER
Its Solicitors.

142 UNITED STATES OF AMERICA, }
 Southern District of New York }
 State and County of New York }

C. W. VEITCH, being duly sworn, says that he is the Secretary of the defendant the Texas & Pacific Railway Company; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true.

C. W. VEITCH.

143 Subscribed and sworn to }
 before me this 7th day }
 of August, 1913. }

H. L. UTTER,

[SEAL] Notary Public, Kings County,
 Certificate filed in New York County.

Exhibit A.

114 THIS INDENTURE, made the fifth day of January, one thousand eight hundred and eighty, between THE NEW ORLEANS BATON ROUGE AND VICKSBURG RAILROAD COMPANY, a corporation created and existing under and by virtue of a special act of the Legislature of the State of Louisiana, approved December 30th, 1869, party of the first part, and THE NEW ORLEANS PACIFIC RAILWAY COMPANY, a corporation created and existing under and by virtue of the laws of the State of Louisiana, party of the second part:

WITNESSETH:

That the said party of the first part, for and in consideration of the sum of one dollar lawful money of the United States of America to it in hand paid by the said party of the second part, at

or before the en sealing and delivery of these 145
 presents, the receipt whereof is hereby acknowl-
 edged, and of other good and valuable considera-
 tions hereby remised, released and quit claimed and
 the said presents does remise, release and quit
 unto the said party of the second part and
 his successors and assigns forever, all the right,
 title and interest of said party of the first part,
 its successors or assigns of, in or to a certain grant
 of public lands granted to the said party of the
 first part by an Act of the Congress of the United
 States, approved March 3, 1871, and entitled "An
 Act to incorporate the Texas Pacific Railroad Com-
 pany and to aid in the construction of its road,
 and for other purposes", together with all and 146
 singular the tenements, hereditaments and appurte-
 nances thereunto belonging or in any wise apper-
 taining, and the reversion and reversions, re-
 mainder and remainders, rents, issues and profit
 thereof; to have and to hold all and singular the
 above mentioned and described premises, together
 with the appurtenances unto said party of the sec-
 ond part to its successors and assigns forever.

In Witness whereof, the said party of the first
 part hath caused its corporate seal to be hereunto
 affixed, and these presents to be signed by its Presi-
 dent and Secretary the day and year first above
 written. 147

W. H. BARNUM, President.

WM. M. BARNUM, Secretary.

Sealed and delivered
 in the presence of

CHAS. L. BEAMAN,
 CHAS. EDGAR MILLS,
 CHARLES NETTLETON,

Commissioners for

[SEAL] Louisiana in New York.

Exhibit B.**ARTICLES OF CONSOLIDATION****NEW ORLEANS PACIFIC RAILWAY CO.**

with

THE TEXAS & PACIFIC RAILWAY CO.

June 20th, 1881.

149

THIS INDENTURE, made this 20th day of June, in the year of our Lord one thousand eight hundred and eighty-one, by and between the NEW ORLEANS PACIFIC RAILWAY COMPANY, a corporation created by, and under the laws of the State of Louisiana, party of the first part, and the TEXAS & PACIFIC RAILWAY COMPANY, a corporation created by and under the laws of the United States, and having and owning certain franchises under the laws of Texas party of the second part.

150

WITNESSETH, That the said party of the first part, for and in consideration of the sum of one hundred dollars, lawful money of the United States, to it in hand paid, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for the other and further consideration hereinafter to be mentioned, hath consolidated itself with the party of the second part under its own proper and corporate name of "The Texas & Pacific Railway Company," on the terms and conditions herein and hereby agreed upon, by granting, bargaining selling, aliening, remising, releasing, conveying and confirming, and by these presents granting, bargaining, selling, aliening, remising, assigning, transferring, conveying and confirming unto the party of the second part, its successors or assigns, all the franchises, corporate

rights or privileges of the said party of the first 151
 part, together with its track, roadbed, buildings,
 rolling stock, engineers' tools, bonds, stocks, grants,
 privileges, property, real and personal, and every
 right, title and interest in and to any franchises or
 property, real or personal, and all rights, of every
 name and kind which the party of the first part has
 any right privilege or interest, situated and being
 in the State of Louisiana, or in the State of Texas,
 or elsewhere: The object and intent of this con-
 tract and agreement being to so merge the rights,
 powers and privileges of the party of the first part
 into the party of the second part, so that the
 party of the second part, under its own charter, 152
 corporate name and organization, shall, without
 impairing any existing right, exercise in addition
 thereto all the powers, rights, privileges and fran-
 chises, and own and control all the properties that
 the party of the first part now exercises and owns,
 or by its charter and by-laws it has the right to
 exercise, own or control.

Provided, however, that the land and land grants
 acquired or to be acquired by the party of the first
 part from the government of the United States,
 either directly or indirectly, or from the State of
 Louisiana, or from the New Orleans, Baton Rouge
 & Vicksburg Railroad Company, or from any other 153
 source, other than lands necessary and needful for
 railway purposes, are expressly exempted and ex-
 cluded from the provisions of this contract, and
 do not pass by any terms or provisions thereof.

And provided further, that the franchises of the
 party of the first part (to be and remain a cor-
 poration until such time as may hereafter be agreed
 upon for its dissolution) shall not be impaired or
 infringed upon by anything contained in this
 contract.

And provided, also, that nothing in this con-

- 154 tract contained is intended to, or shall impair any legally existing contract by mortgage or otherwise, of the party of the first part.

The further consideration for this contract and agreement is, that the party of the second part shall receive from the party of the first part, or its shareholders, share for share of its capital stock of one hundred dollars per share, issued or to be issued (not exceeding the rate of twenty thousand dollars per mile, for 400 miles of road, which, it is estimated, will be constructed under the existing franchises of the party of the first part); that is to say: The party of the second part shall deliver to the
155 party of the first part, or to such person as the latter shall direct, or to its stockholders, one share of its capital stock of one hundred dollars per share, for a like amount of the capital stock of the party of the first part now outstanding, when and as transferred to the party of the second part, and as further stock of the party of the first part is issued (not exceeding twenty thousand dollars per mile, as aforesaid) similar exchanges and transfers shall be made until all the stock of the party of the first part (not exceeding the rate per mile as aforesaid) shall have been issued.

156 Provided that the stock of the party of the first part received by the party of the second part in exchange, under this agreement, shall not be canceled, but shall be held and used by the party of the second part for the purpose of preserving to the said second party the enjoyment of all rights and privileges pertaining to the ownership thereof, until otherwise provided by authorized corporate action, the corporate existence of the party of the first part shall be maintained, and its power to carry out all existing contracts, and to mortgage any land grant it has acquired, or may acquire, from the New Orleans, Baton Rouge & Vicksburg

Railroad Company or otherwise, remain wholly 157
unimpaired hereby.

In witness whereof, the parties aforesaid, being
the contracting parties of the first and second part,
have mutually executed this indenture, under the
corporate seals of the said Companies, and attested
by the signatures of the proper officers, the day and
date above.

TEXAS & PACIFIC RAILWAY Co.

By JAY GOULD, President.

[L. S.] Attest, C. E. SATTERLEE, Secretary.

NEW ORLEANS PACIFIC RAILWAY Co.

By E. B. WHEELOCK, President. 158

[L. S.] Attest, WM. S. NICHOLSON, Secretary.

Recorded, and original filed in office of Secretary
of State of the State of Louisiana, June 28, 1881.

160 **Order Granting Motion to Dismiss
Complaint.**

At a term of the District Court of the United States, held in and for the Southern District of New York, in the Post Office Building, at Broadway and Park Row, Borough of Manhattan, City of New York, on the 20th day of November, 1913.

Present :

161 Hon. CHARLES M. HOUGH,
Judge.

DAVID J. WALLER, JR., and
another as Trustees, &c.,
Plaintiffs,

AGAINST

THE TEXAS & PACIFIC RAILWAY
COMPANY, NEW ORLEANS
PACIFIC RAILROAD COMPANY
and UNION TRUST COMPANY
OF NEW YORK,
Defendants.

Order Granting
Motion to
Dismiss
Complaint.

In Equity
E. 10-209.

162

A motion having been made by the defendant, Union Trust Company of New York to dismiss the bill of complaint herein as against said defendant, Union Trust Company of New York.

Now, on reading the bill of complaint herein, verified May 6th, 1913 and filed herein on May

6th, 1913, and on reading the notice of this motion and proof of due service thereof on August 11th, 1913 upon Messrs. King & Osborn, solicitors for the complainant, and upon Messrs. Pierce & Greer, solicitors for the defendant The Texas & Pacific Railway Company, and after hearing Hoffman Miller, Esq., of counsel for the Union Trust Company of New York, in support of said motion and Messrs. King & Osborn, the solicitors for the plaintiff in opposition thereto, and the Court having determined that said bill of complaint does not set forth a cause of action in equity against said defendant Union Trust Company of New York. 163

Now on motion of Messrs. Miller, King, Lane & Trafford, solicitors for the defendant, Union Trust Company of New York, it is 164

ORDERED, that said motion to dismiss the bill of complaint herein as against said defendant, Union Trust Company of New York be and the same hereby is granted; and it is further

ORDERED, that the bill of complaint herein be and the same hereby is dismissed as against the defendant, Union Trust Company of New York.

C. M. HOUGH 165
D. J.

166 EVIDENCE FOR PLAINTIFF:

LEVI E. WALLER testified:

I am one of the complainants; reside at Wilkes barre, Pa. Am one of the Executors and Trustees under the will of David Jewett Waller, deceased, formerly of Bloomsburg, Columbia County, Penna. He was my father. This paper handed me is a true copy of my father's will. This copy is certified. The will is dated First day of December, 1883 and was probated December 29, 1893. He died December 7, 1893. This certified copy of the will is offered in evidence.

167 The bonds sued on in this case, and described in our Bill of Complaint, came into our possession among the papers of my father's estate, when I qualified as Executor and Trustee and we are still the holders and owners of same. I think my father had owned them about seven or eight years before his death. We had no knowledge or information of the consolidation of the New Orleans Pacific with the Texas & Pacific until 1909; nor of the proceedings and decree in the Dillon and Alexander case, in the U. S. District Court of New Orleans, La. in the year 1890, referred to in the Bill of Complaint herein and the answer of the
168 Texas & Pacific Ry. Co. until about the year 1909.

We filed a bill in the United States District Court at New Orleans, in 1908 to collect these bonds and it is still pending there, undisposed of.

PETER PALMER, testified:

I am transfer clerk of the Union Trust Co. and reside at 125 Pierpont Street, Brooklyn. (Being handed the bonds described in Complainants' Bill and asked to identify the signature of I. H. Frothingham, President, Union Trust Co. at that time, says); I identify that as the signature of I. H. Frothingham President at that time. I know it

from having seen it. Have never seen him write his name. I am the custodian of the Bond Book showing the issuance of these bonds. According to the Bond Book of the Union Trust Co. these bonds were issued by these numbers. It is agreed by counsel that the bonds described in the bill by numbers, are produced and proven, except as to one, filed in New Orleans, and one mislaid. 169

It is also agreed that the Bond Book of the Union Trust Co. Trustee in the Deed of Trust Securing These Bonds, of date Sept. 4th 1872 Shows that there was issued and certified by said Trustee (1275) Twelve hundred and seventy five Bonds, of the denomination of \$1,000.00 each, and numbered from 1 to 1200 inclusive, and from 1501 to 1575 inclusive. 170

Plaintiff's Exhibit 2.—Mortgage.

MORTGAGE.

STATE OF LOUISIANA, }
City of New Orleans, }

Personally came and appeared before me, Thomas Jefferson Beck, a notary public, duly commissioned and sworn, and acting in and for the city of New Orleans, parish of Orleans, State of Louisiana, Calvin H. Allen, President of the New Orleans, Baton Rouge & Vicksburg Railroad Company, a corporation duly incorporated by the laws of the State of Louisiana, and having its domicile in the aforesaid city of New Orleans, the said Allen herein acting under and by virtue of certain resolutions passed at a meeting of the board of directors of said company, held on the twenty- 171

172 seventh day of August, Anno Domini eighteen hundred and seventy-two.

And also came and appeared the Union Trust Company of New York, a corporation chartered by the State of New York, and having its domicile and place of business in the city of New York, herein appearing for the purpose of accepting the mortgage and hypothecation herein granted and given by and through Frank N. Butler, of the city of New Orleans, the agent and mandatory of the said Union Trust Company of New York, duly appointed under and by virtue of a certain power of attorney, made and executed before Charles Nettleton, Esq., of the city of New York, a commissioner of the State of Louisiana, bearing date on the twenty-ninth day of August, A. D. 1872, hereunto annexed and made part of this act.

And the said Calvin H. Allen, President as aforesaid, did declare and say, that the New Orleans, Baton Rouge & Vicksburg Railroad Company, through its board of directors, lawfully assembled, and in accordance with the charter of the said company and the laws of the State of Louisiana, in such cases made and provided, and for the purposes, objects and uses authorized by said charter, had resolved and directed to be issued and negotiated a series of twelve thousand bonds of the said company, each in the alternative of one thousand dollars, United States gold coin, or two hundred pounds sterling, British money, at the option of the holder, the said bonds being numbered from one (1) to twelve thousand (12,000), inclusively, and to amount, in the aggregate, to twelve millions of dollars; which said bonds are all equally secured by this act, and are to be of like tenor, and in the form following:

UNITED STATES OF AMERICA.

175

STATE OF LOUISIANA.

No.	£200.	\$1,000.
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NEW ORLEANS, BATON ROUGE AND
VICKSBURG RAILROAD COMPANY.*First Mortgage seven per cent. Land Grant and
Sinking Fund Gold Bond.*

KNOW ALL MEN BY THESE PRESENTS, that the New Orleans, Baton Rouge and Vicksburg Railroad Company, a corporation organized pursuant to the laws of the State of Louisiana, is indebted to the Union Trust Company of New York, a corporation organized pursuant to the laws of the State of New York, or the bearer hereof, in the sum of one thousand dollars, of the gold coin of the United States of America, which sum of one thousand dollars, in the United States gold coin, or, at the option of the holder, two hundred pounds British sterling, the said railroad company promises to pay to the bearer hereof, on the first day of September, in the year one thousand nine hundred and two, with interest at the rate of seven per centum per annum, in gold coin, or sterling, as aforesaid, free from any United States government tax, payable semi-annually on the first day of March and September in each year, upon presentation and surrender of the coupons hereto annexed, as they severally become due. All payments, whether of principal or interest, secured by this bond, or under the sinking fund hereinafter referred to, are to be made at the option of the holder, in British sterling money, in London, or in the gold coin of the United States of America, in the city of New York, at the office or agency of said company. And in case of non-payment of any half-yearly installment of interest which shall have become payable, and shall have been de-

176

177

178 mandated, and the continuance of such default for the period of six months after any such demand, the principal of this bond shall become due in the manner and with the effect provided in the act of mortgage or hypothecation, securing the payment of the same hereinafter mentioned.

This bond is one of a series of twelve thousand bonds, each of one thousand dollars, of like tenor and date, numbered respectively from 1 to 12,000, inclusive, and amounting in the aggregate to twelve million dollars, the payment of each and all of which is equally secured, by an act of mortgage or hypothecation, bearing date the Fourth day of September, eighteen hundred and seventy-two, duly entered into, executed and delivered by the said railroad company, to the said Union Trust Company, before Thomas Jefferson Beck, Notary Public, and recorded in the proper offices in the State of Louisiana, and in Washington, mortgaging and hypothecating to the said Union Trust Company, the railroad of the said railroad company and its equipments, appurtenances, property, real and personal, franchises and privileges appertaining thereto, and lands and other property in the said act of hypothecation or mortgage, more particularly mentioned and described.

180 This bond is entitled to the benefit and security of a sinking fund, provided for and described in the said act of hypothecation or mortgage, to be set apart for the redemption of the bonds secured by said act of hypothecation or mortgage, whereby the proceeds of all lands granted to the said railroad company, are to be applied to the payment of interest on said bonds, and to the redemption of the said bonds, and whereby also one per centum of the gross earnings of the said railroad company are, after the first day of June, one thousand eight hundred and seventy-nine, to be also applied to the redemption of the said bonds, as in said act

of hypothecation and mortgage is more fully set forth and described. 181

This bond shall pass by delivery, or it may be registered by its owner in the books of the company, at the transfer agency of said company, in the city of New York, and at such other places in the United States and in Europe, as the said railroad company may from time to time designate. After a registration of ownership, certified hereon by the transfer agent of the company no transfer, except upon the books of the company, shall be valid, unless the last transfer shall have been to bearer, and transferability by delivery thereby restored, but this bond shall continue subject to successive registrations and transfers to bearer as aforesaid, at the option of the holder. 182

This bond shall not become obligatory, until it shall have become authenticated by a certificate endorsed hereon and signed on behalf of the said Union Trust Company.

This bond and all other bonds of the series aforesaid are paraphed by the said Notary Public, to identify them with the aforesaid act of hypothecation or mortgage.

In witness whereof, the said railroad company has caused its corporate seal to be hereto affixed, and the same to be attested by the signatures of the president and secretary, this sixteenth day of September, in the year one thousand eight hundred and seventy-two. 183

President.

Secretary.

Said bonds, with accompanying coupons, being identified with this act by the paraph of me, the said notary, affixed to the said bonds.

184 And in order to secure to the persons and bodies corporate, who have or shall become the holders of the said bonds and coupons, the prompt payment of the principal and interest therein stipulated, according to their tenor and effect, and furthermore to secure the prompt and full payment by the said railroad company to the said trust company of the sinking fund for the gradual redemption of the principal of said bonds, and for and in consideration of one dollar to the said railroad company, paid by the aforesaid Union Trust Company of New York, trustee, and for other valuable considerations by the said railroad company re-
185 ceived, the said Allen, president of the said company, acting for and in its behalf and under its authority and instructions, has mortgaged and hypothecated, and does hereby mortgage and hypothecate, in favor of the said Union Trust Company of New York, trustee, and its successor or successors hereunder, and for the benefit of whomsoever shall from time to time hold the aforesaid bonds and coupons of interest, or any one or more of the same, all and singular the railroad of the said New Orleans, Baton Rouge and Vicksburg Railroad Company which the said company is by law authorized to construct, being the line of rail-
186 road heretofore constructed and to be constructed, to wit: the whole of the lines of railroad of the said company as hereinafter described; commencing at a point in the main line of railroad of the said company in the parish of East Baton Rouge, and extending thence through the parishes of East Baton Rouge, Ascension, St. James, St. John Baptist, St. Charles and Jefferson, to a point on the left bank of the Mississippi river in the city of New Orleans, Parish of Orleans, one hundred miles, more or less; also commencing at the point in the main line of the railroad in the parish of East Baton Rouge above mentioned, and extending

thence through the parishes of West Baton Rouge, 187
 Iberville, Pointe Coupée, St. Landry, Avoyelles,
 Rapides via Alexandria, Natchitoches and De Soto
 to Shreveport, in the parish of Caddo, two hun-
 dred and fifty-four miles, more or less; also com-
 mencing at the terminus of the above-described
 line in the city of Shreveport, and extending thence
 through the parishes of Caddo and Bossier to the
 State line of Arkansas, forty-six miles, more or less;
 in all about four hundred miles of railroad, within
 the State of Louisiana, including all the railroads,
 ways, rights of way, depot grounds and other
 lands, all tracks, road-bed, rails, bridges, viaducts,
 culverts, fences and other structures, depots, 188
 station-houses, engine-houses, car-houses, freight-
 houses, wood-houses, water stations and other
 buildings, and all machine-shops, and all real and
 personal property held or acquired, or hereafter to
 be held or acquired, by the said railroad company,
 its successors or assigns, for use in connection with
 the above-described railroads of the said railroad
 company, or with any part thereof, or with the
 business of the same, and including all steamboats,
 boats, barges, lighters, locomotives, tenders, cars
 and other rolling stock or equipment, and all ma-
 chinery, tools, implements, fuel and materials for
 constructing, operating, repairing, or replacing 189
 the said railroads, or any part thereof, or of any
 of the equipments or appurtenances of the said
 railroads, or any part thereof, and all machinery
 of all kinds, and all and singular the other personal
 property of any nature, kind and description
 whatsoever, belonging to the said railroads, and
 all real estate of every kind appurtenant to the
 said railroads, wheresoever the same may be situ-
 ated; and also all franchises connected with or
 relating to the said railroad or branches, or to the
 construction, maintenance or use of the said rail-
 road or branches, and all the property, corporate

190 franchises, rights and privileges of whatsoever
name or nature now held by, or granted by, or
hereafter to be acquired by or granted to the said
railroad company, or its successors or assigns, to-
gether with all and singular the tenements,
hereditaments and appurtenances to the said rail-
road, branches, lands and premises, or either
thereof belonging, or in anywise appertaining;
and the reversion and reversions, remainder and
remainders, tolls, incomes, revenues, rents, issues
and profits thereof; and also the estate, right, title,
interest, property, possession, claim and demand
whatsoever, as well in law as in equity, of the said
191 railroad company, or its successors or assigns, of,
in and to the same, and any and every part thereof,
with the appurtenances. And also, all the right,
title, interest, claim, estate or demand whatsoever
which the said railroad company or its successors
now has, or may at any time hereafter acquire, or
become in any way entitled to, of, in, and to all the
lands and sections of lands situate, lying and being
on either side of the said railroad, as the same may
be finally located and constructed, in accordance
with and as granted by the act of Congress, en-
titled "An Act to incorporate the Texas Pacific
Railroad Company, and to aid in the construction
192 of its road, and for other purposes," approved
March 3d, 1871; and also, all the right of way
granted by the State of Louisiana, or by the United
States, together with all and singular the tene-
ments, hereditaments, rights, privileges, easements,
income, advantages and appurtenances to the said
lands and premises belonging, or in anywise ap-
pertaining, and to the reversion and reversions,
remainder and remainders, rents, issues and profits
thereof; and also, all the estate, right, title and
interest, property, claim and demand whatsoever,
at law or in equity, of the said railroad company,

of, in and to the same, and any and every part and parcel thereof. 193

And it is understood, covenanted and agreed, that the said trust company is to have and to hold the above-mentioned and described railroad, branches, premises, rights, franchises, lands, real and personal property, unto the said Union Trust Company, its successors and assigns, as trustee in trust and for the uses and purposes herein expressed and declared, of and concerning the same, that is to say:

ARTICLE FIRST.—Until default shall be made by the said railroad company, its successors or assigns, in the payment of the principal or interest, or some part thereof, of the said bonds, or some one of them, or until default shall be made in some payment into the sinking fund hereinafter mentioned, or in some other requirement hereof, the said railroad company, its successors and assigns, shall be suffered and permitted to possess, manage, operate and enjoy the said railroad and branches, with its equipments and appurtenances, and also the lands and premises, property and franchises hereinbefore described; and to receive, take and use the tolls, incomes, revenues, rents, issues and profits thereof, in the same manner and with the same effect as if this mortgage had not been made. 194 195

ARTICLE SECOND.—In case, first, default shall be made in the payment of any interest on any of the said bonds, according to the tenor thereof, or of the coupons thereto annexed, or in the payment of any part of the principal of said bonds, or any of them, when the same shall become due, and that any such default shall continue for the period of six months; or, secondly, in case default shall be made in any payment by these presents required to be made into the sinking fund hereinafter men-

tioned, and that such default shall continue for the period of six months; or, thirdly in case default shall be made in the performance or observance of one or other requirement hereof, and that such last-mentioned default shall continue for the period of six months, then, in either of such cases, the whole principal sum mentioned in each and all of said bonds then outstanding, shall, at the option of the holders of a majority in interest of said outstanding bonds, forthwith become due and payable; and in either of such cases also it shall be lawful for the said trust company, or its successors, by their officers, attorneys or agents, the said default or
197 failure still existing, upon the written request of the holder or holders of any bonds issued under this instrument, or on their own motion, to enter into and upon, and take possession of all and singular the railroads, lands, personal property and premises hereby conveyed, or intended so to be, and each and every part thereof, without any let or hindrance of or from the said railroad company, and to have, hold, possess, use and employ the same, operating by their superintendents, managers, receivers or servants, or other attorneys or agents, the said railroads, and conducting the business thereof, and making from time to time all repairs and replacements, and such useful alterations, additions and improvements thereto as may
198 seem to them to be judicious, and to collect and receive all tolls, freight, incomes, rents, issues and profits of the said railroads, lands, personal property and premises, and of every part and parcel thereof, and after deducting the expenses of operating the said railroads, and conducting the business thereof, and all the expenses incurred in the holding and management of said lands, and of all the said repairs, replacements, alterations, additions and improvements, and all payments which may be made for taxes and assessments upon the

said premises or any part or parcel thereof, as well 190
 as just compensation for their services, and for the
 services of such attorneys and counsel as may have
 been by them employed, to apply the moneys arising
 as aforesaid to the payment of interest on the
 said bonds, in the order in which such interest
 shall have become due, ratably to the persons holding
 the coupons, evidencing the right to such interest;
 and after paying all interest which shall have become
 due, to apply the said moneys to completing and filling
 up said sinking fund, according to the terms of this
 instrument, or the payment of the principal of such of
 the said bonds as may then be due and unpaid, ratably
 and without discrimination or preference; and if, after
 satisfaction thereof, a surplus shall remain, to pay over
 such surplus to the said railroad company, its successors
 or assigns, or as any court of competent jurisdiction
 shall order. 200

ARTICLE THIRD.—In case default shall be made
 as aforesaid, and shall continue for the period of
 six months as aforesaid, the said trust company or
 its successors, after entry as aforesaid, or other
 entry, or without entry, by their officers, attorneys
 or agents, may also, and upon the written request
 of the holders of at least one thousand bonds then
 outstanding, shall foreclose the equity of redemption
 of the property embraced in this act of hypothecation,
 by judicial intervention of legal proceedings, or sell
 and dispose of all and singular the railroads, lands,
 personal property and premises hereby conveyed, or
 intended so to be, at public auction, in the city of
 New Orleans, or at such other place, within the State
 of Louisiana, as the said trust company or their
 successors shall designate, and at such time as they
 may appoint, having first given notice of the place
 and the time of such sale by advertisement published
 not less than three 201

202 times a week, for six weeks, in one or more newspapers published in the city of New York, and also in one or more newspapers published in the State of Louisiana, and wherever else required by law, and to adjourn the said sale from time to time in their discretion; and if so adjourning, to make the same, without further notice, at the time and place to which the same may be so adjourned, and to make and deliver to the purchaser or purchasers of the said premises, good and sufficient deed or deeds in the law for the same in fee-simple; which sale, made as aforesaid, shall be a perpetual bar, both in law and equity, against the said railroad company, its successors and assigns, and all other persons claiming or to claim the said premises, or any part or parcel thereof, by, from, through or under the said railroad company, its successors or assigns; and after deducting from the proceeds of such sale just allowances for all expenses thereof, including attorneys' and counsel-fees, and all other expenses, advances or liabilities which may have been made or incurred by the said trust company in respect to the said railroad, lands, premises, or any part or parcel thereof, or in operating or maintaining the said railroad, or any part thereof, or in managing the business thereof while in their possession, and in arranging for and completing the sale aforesaid, and all the payments which may have been made by them for taxes or assessments on the said premises, or any part thereof, as well as compensation for their own services, to apply the said proceeds to the payment of the principal of such of the said bonds as may be at that time unpaid, whether or not the same shall have previously become due, and of the interest which shall at that time have accrued on the said principal, and be unpaid, without discrimination or preference, but ratably to the aggregate amount of such unpaid principal, unpaid and accrued interest;

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and if, after payment of the same in full, a surplus shall remain, to pay over such surplus to the said railroad company, or render the same as any court of competent jurisdiction shall order; it being expressly agreed and understood that in no case shall any advantage be taken of any valuation, appraisement or extension laws by the said railroad company, nor of any injunction or stay of proceedings, or any process to be applied for or obtained by them to prevent the entry, possession or use of said railroad and premises, as provided in this instrument, or to prevent such entry and sale as aforesaid. And in case of any sale, whether made under this power or upon legal proceedings, for foreclosure, as aforesaid, the said trust company and its successors may bid for and purchase said property, real or personal, or any part thereof, in behalf of the holders of said bonds.

And it is hereby declared and agreed, that the receipt of the said trust company, or of its successor making such sale, shall be a sufficient discharge to the purchaser or purchasers of the premises which shall be sold, as aforesaid, for his or their purchase-money, and that such purchaser or purchasers, his or their heirs, executors or administrators, shall not, after payment thereof, and having such receipt, be liable to see to the application of such purchase-money upon or for the trusts or purposes of these presents, or be in any manner whatever answerable for any loss, misapplication or non-application of such purchase-money, or of any part thereof, or be obliged to inquire into the necessity, expediency or authority of or for any such sale.

ARTICLE FOURTH.—It is hereby understood, covenanted and agreed by and between the parties to this act, that the said railroad company shall at all times hereafter keep at its office in the city of

208 New York, and in such other places in this country or in Europe as it may hereafter appoint, a book or books for the registry of bonds secured hereby, and that any holder of any of the bonds issued under the provisions of this act may there register his bonds upon presenting the same; and that when a bond is so registered in the name of any person, such person shall be deemed and regarded as the owner of such bond; and that all payments of principal thereon shall thereafter be made to him or his order only; and that such payments to him or to his order shall be valid payments of such principal, and a discharge to
209 the said railroad company to the extent of the sums so paid. And also that such registry may be changed upon presentation of the bond with the written order of the person in whose name it is registered, properly authenticated, to the name of such person as may by the said written order be designated for the purpose, and he shall thereafter be deemed and regarded as the owner of the bond, under the same circumstances and conditions, and with the same rights as the prior owner, including the right to change the registration in manner aforesaid; and so, from time to time as the owner for the time being may desire; and that
210 the registered holder may also have the right to register the bond as payable to bearer, in which case the bond shall be payable to the holder presenting the same. And any holder of a bond so registered as payable to bearer may again cause it to be registered in his name, with the same effect as the first registration, and successive registrations may in the same manner be made from time to time as may be desired; and also that the holder of any of said bonds may, at his option, surrender the coupons attached thereto to be canceled, in which case interest thereon will thereafter be payable to him or his order only.

ARTICLE FIFTH.—It is further hereby under- 211
stood, covenanted and agreed, by and between the
parties to this act, that the said railroad company
will, with all reasonable dispatch, make and de-
liver to the said trust company true and accurate
lists, schedules and maps, showing the numbers,
precise quantity of lands, location, position and
boundaries of each and every piece, parcel, sec-
tion or parts of sections of the aforesaid lands
now owned, or any lands which may be hereafter
owned or acquired by it, not required for the nec-
essary or convenient operation of the railroads of
the said railroad company, and also lists and
schedules showing the minimum valuation and 212
prices at which the respective pieces, parcels, sec-
tions or parts of sections of said lands may be sold
and conveyed, as hereinafter provided, which shall
be approved by the board of directors, and signed
by the president and secretary of the said railroad
company, and also approved and signed by the
said trust company. But it is understood and
agreed by and between the parties hereto, that the
said railroad company, by and with the consent
and approval in writing of the said trust company,
or of its successor or successors in this trust, may
at any time, not oftener than once in each year
from the date of the last approval by the said rail-
road company, re-value all of said lands not then 213
sold, and re-affix to each parcel or section of the
then unsold lands a new minimum price, and upon
the approval of said trust company of such new
valuation or minimum price, the same shall there-
after become binding upon both parties hereto.

And that the said railroad company, with the
consent in writing of said trust company, its suc-
cessor or successors in this trust, may sell and
convey any such lands not necessary or required
to be retained for the convenience and use of the
said railroad company; and that whenever the

- 214 said railroad company shall, from time to time, certify to said trust company that it has sold or contracted for the sale of any sections, parcel or parcels of said lands, the said trust company, its successor or successors in this trust, shall and will join with the said railroad company in duly executing a deed or contract sufficient in law to convey to the purchaser, his heirs or assigns, all the right, title, interest, property, possession, claim, demand and estate of both the parties to this act in and to the parcel or section of land so sold. And the said trust company shall and will deliver such deed or contract to such purchaser, upon receiving from him the whole price of such parcel
- 215 or section of land, either in cash, or, if such land be sold upon credit, then upon receiving from such purchaser such portion of the said price as shall be agreed to be paid in cash (which shall not be less than ten per cent. of the whole price), together with a bond for the residue of the purchase-money, secured by mortgage upon the land thus sold, executed by the purchaser to said trust company in due form, to secure to it the payment of the residue, with interest thereon at the rate of not less than seven per cent. per annum, payable semi-annually or annually; and every such bond and mortgage shall contain a provision to the effect
- 216 that in case the interest thereon shall remain in arrear and unpaid for six months after the same shall become due, then the whole amount of the principal sum mentioned therein shall thereupon, immediately after the expiration of the said six months, become due and payable, and every such mortgage shall also contain a personal obligation on the part of the purchaser and mortgagor to pay the principal and interest thereby secured, at the times and according to the terms, tenor and legal effect of said bond therein mentioned. The deeds so to be given shall bear even date with the bonds

and mortgages so to be executed, and shall specify 217
 the actual and true amount of the whole consid-
 eration-money or price, and the manner in which
 the same has been paid or secured; every such bond
 and mortgage shall be held by said trustee for the
 purpose of the trusts herein declared, and as part
 of the trust estate, and as security for the bonds
 this mortgage is given to secure.

And it is further covenanted, understood and
 agreed, by and between the parties to this act, that
 out of the proceeds of sales of the aforesaid lands,
 the said trust company shall pay, from time to
 time, as required by the said railroad company, all
 necessary and proper expenses of the land depart- 218
 ment of the said railroad company, as shown by
 accounts thereof, to be duly verified, including sal-
 aries, office expenses of land commissioners, ex-
 penses of appraising, surveying and locating lands,
 taxes, stamps and fees, expenses of advertising,
 printing and stationery, and of foreign agents,
 commissions on sales made by agents, gratuities
 and allowances for improvements, and legal ex-
 penses. And that said trust company shall retain
 to its own use, out of the proceeds of said sales,
 its own just allowances for services rendered and
 expenses incurred in the premises. And that the
 balance of the proceeds of sales of the aforesaid 219
 lands shall be appropriated to the purposes of the
 sinking fund herein provided for the redemption
 of the bonds hereby secured, except as herein other-
 wise directed.

And it is further covenanted, understood and
 agreed, by and between the parties to this act, that
 in the event of a conflict of claims to the title to
 any of the above-described lands, on the part of
 preëmptors or other claimants or actual settlers
 thereon, the said railroad company and the said
 trust company shall have power to amicably com-

220 promise, settle and adjust such claims, on such terms as said trust company shall approve.

ARTICLE SIXTH.—It is further covenanted, understood and agreed, by and between the parties to this act, that if the said railroad company shall hereafter, under any right or franchise now owned by it, and not conveyed by this trust-deed or mortgage, further extend its said road, or shall, under any right of franchise now owned, or hereafter to be acquired, construct any other railroad or railroads, or become the owner of any other railroad already constructed, then, for every such extension
221 and every such railroad constructed or to be constructed, a further issue of bonds may be made hereunder by the said railroad company, the aggregate amount of which shall not exceed the rate of twenty thousand dollars for every mile of road, where lands shall not have been granted by any State or by the United States to aid in the construction thereof, and thirty thousand dollars per mile in all cases where lands shall have been so granted. And all such bonds shall be of the same tenor as that provided for in the form of bond hereinbefore set forth, subject only to necessary variation as to the distinguishing numbers and
222 the dates thereof, and shall bear numbers running from the number twelve thousand upwards, and shall be entitled to the benefit of a sinking fund, to be created in the same manner as is herein provided. And the said railroad company hereby agrees to execute and deliver to the said trust company, its successor or successors, upon every such further issue of bonds, any further reasonable and necessary act, deed, mortgage or hypothecation, to bring in and subject to the conditons of these presents every such extended or future acquired road, and every other land and property, real and personal, that may hereafter be acquired by it for the

purpose and with the intent of securing the pay- 223
 ment of the said bonds composing every such in-
 creased issue, as well as the bonds hereinabove
 described, equally and alike upon the property of
 the said railroad company, with the interest due
 and to grow due thereon, and the payment to said
 trustee of the said sinking fund, in the same man-
 ner as if all said bonds had been originally se-
 cured by one and the same act, deed, mortgage or
 hypothecation.

Provided, however, that if any railroad or rail-
 roads which may hereafter be acquired by said rail-
 road company, shall, at the time of such acquisition, 224
 be subject to the lien of any trust-deed, act, hypothe-
 cation or mortgage theretofore made to secure bonds
 then outstanding, no more bonds shall be issued
 hereunder on any such railroad or railroads than
 such an amount as shall, together with such out-
 standing bonds, be equal to the rate per mile here-
 inbefore mentioned; but bonds may be issued here-
 under on any such railroad or railroads in ex-
 change for an equal amount of such outstanding
 bonds.

ARTICLE SEVENTH.—And it is further under-
 stood, covenanted and agreed, by and between the 225
 parties to this act, that such portion of the pro-
 ceeds of the sales of the lands hereby conveyed as
 may be required for the purpose, after applying
 the net income derived from the operation of said
 railroad and branches, shall, at the election of the
 said railroad company, be applied by the said
 trust company or its successors to the payment of
 any coupons for interest which shall have matured
 upon the bonds hereby secured, and the balance
 of such proceeds shall be devoted to the sinking
 fund by this act created.

226 ARTICLE EIGHTH.—And for the purpose of providing a sinking fund for the redemption of the bonds secured hereby, it is further covenanted, understood and agreed, by and between the parties to this act, that the said railroad company shall and will, on the first day of June, 1880, and on the first day of June of each succeeding year thereafter, pay to the said trust company or its successors a sum of money which shall be equal to one per centum of the gross earnings received by the said railroad company from the operation of its said railroad and branches during the twelve months theretofore immediately preceding, which said sum of
227 money shall be applied by the said trust company or its successors for the redemption of the bonds secured hereby in the manner herein provided.

It is further covenanted, understood and agreed, by and between the parties to this act, that the said trust company or its successors, on the first days of July and January of each and every year, shall designate by lot for redemption a number of bonds, sufficient to equal, as near as may be, the accumulations of the said sinking fund hereby created, from the payments aforesaid, and the surplus arising from the sale of lands (after providing for the payment of coupons as hereinbefore mentioned), at the par value thereof, and five per cent.
228 premium, and shall thereupon cause a notice to be printed in two or more of the daily newspapers published in the city of New York, for sixty days, stating the numbers of the bonds so designated for redemption, and at the expiration of such time interest on the said bonds shall cease, and the said trust company and its successors shall pay such designated bonds at such rate on presentation.

ARTICLE NINTH.—The said railroad company hereby covenants and agrees, that it will pay or

cause to be paid the bonds herein mentioned, and 229
 the interest thereon, according to the terms thereof, and all taxes, levies and assessments imposed and assessed, or which may hereafter be imposed or assessed upon the premises, franchises and property hereby mortgaged or hypothecated, or intended so to be, and also the United States government tax upon the interest payable on said bonds and each of them, and represented by the coupons annexed to said bonds, and will, at its own cost and expense, do or cause to be done all things necessary to preserve and keep valid and intact the lien, hypothecation or incumbrance hereby created.

230

ARTICLE TENTH.—And the New Orleans, Baton Rouge and Vicksburg Railroad Company does further covenant and agree with the said trust company, acting in the interest of all parties connected with the aforesaid bonds, and with the respective persons, companies or organizations who have or shall at any time become the holders of said bonds, or any of them, or of the coupons thereunto attached, or any of them, that the said railroad company shall and will, at any time, and from time to time hereafter, upon due request, make, execute and deliver all such other and further acts, deeds and things as shall be reasonably 231
 devised and required to effectuate the intention of this act, and to confirm and assure to the said trust company or its successors all and singular the right of mortgage and lien herein granted and conveyed, so as to render the same available for the security and satisfaction of the said bonds, according to the intent and purpose hereinbefore expressed.

ARTICLE ELEVENTH.—And it is further covenanted and agreed, by and between the parties to this act, that the stamps required by the United

232 States Revenue laws, instead of being placed on this mortgage, shall be placed on the bonds secured hereby as the same shall be issued.

ARTICLE TWELFTH.--And it is further mutually covenanted and agreed, by and between the parties to this act, that in case of the resignation, removal, insolvency or incapacity, or inability for any other reason of the said trust company to act in execution of the trust hereby created, then the holders of a majority in interest of said bonds, may select and designate in writing one or more competent persons, or another corporation competent to act, 233 in the place of said trust company, to execute the trusts hereby created. And until the bondholders make such selection, the president of said railroad company, with the consent in writing of the owners or holders of said bonds to the amount of two hundred thousand dollars, may select and appoint one or more persons, or another corporation, competent to act, to fill the vacancy, and the person, persons or corporation so selected shall have and possess, and be vested with the same rights and powers as a trustee or trustees, as he, they or it would have had and possessed, or been vested with, had he, they or it been originally made a party or parties to this act; and the said railroad com- 234 pany hereby covenants to make, execute and deliver all such other or further acts, deeds and things as may be necessary to enable the person or persons, or corporations so appointed, to execute the trust hereby created; and successors of any such new trustee or trustees may be appointed in like manner as often as a vacancy in said trust, for either of the causes above mentioned, shall occur.

In testimony whereof, I have caused this act to be signed by the said Calvin H. Allen, President

of the New Orleans, Baton Rouge and Vicksburg Railroad Company, by the Union Trust Company of New York, and by Harry D. Smith and Edwin C. Mix, Jr., two competent and lawful witnesses, and have hereunto affixed my official seal and signature, at the city of New Orleans, in the State of Louisiana, this Fourth day of September in the year of our Lord one thousand eight hundred and seventy-two and of the independence of the United States the ninety-seventh. 235

"Original Signed"

CALVIN H. ALLEN

President New Orleans, Baton Rouge
& Vicksburg Rail Road Company 236

UNION TRUST COMPANY OF NEW YORK

per pro Fred N. Butler

Attorney in fact

THOMAS J. BECK

Not. Pub.

H. D. SMITH

E. C. MIX, JR.

STATE OF LOUISIANA, }

Parish of }

RECORDER'S OFFICE.

I hereby certify the above and foregoing to be a true and faithful Copy of the original Act of record in my office and that said original Act of mortgage has been duly recorded in the office of the Recorder of Mortgages for this Parish (Orleans). 237

IN WITNESS WHEREOF, I grant these presents under my official signature and seal, this 4th day of September, A. D., 1872.

THOMAS J. BECK

Not. Pub.

238 To avoid printing more than one copy of this mortgage

It is stipulated, that complainants introduced a duly certified copy of this mortgage from each of the following Parishes of Louisiana, showing same to have been duly recorded in said Parishes—as follows :

Caddo Parish, recorded in Book G, page 591,
on 24th day of September, 1872.

Bossier Parish, recorded in Book G, pages 494-
507, on 14th day of September, 1872.

239 Rapides Parish, recorded in Book D, folio 141,
on 17th day of September, 1872.

Avoyelles Parish, recorded in Book 16, page
614, on 16th day of September, 1872.

Plaintiff's Exhibit 3.—Letter from 241
John B. Bloss.

JOHN B. BLOSS,

LAND ATTORNEY,

Room 6, May Building,

Procures Patents from the
 United States upon en-
 tries and locations of
 Public Lands. Will give
 special attention to ad-
 ment of Land Grant
 Railroad Claims.

242

P. O. Box 29.

WASHINGTON, D. C., Sept 10th 1872

HON C. DELANO

Secretary of the Interior

SIR,

By the 21st section of the Act March 3d 1871 (16. Stat 579) a grant of lands was made to the New Orleans, Baton Rouge and Vicksburg R R Co. upon the same terms and conditions as made to the Texas Pacific R. R. by said Act.

The 11th section of the said act provides for 243
 the recording of the Company's mortgage in your Department.

I inclose a duly certified Copy of a mortgage of said N. O. B. R. & V. R. R. Company and ask that the same be recorded, and that its receipt be acknowledge to me

Very respectfully

JNO. B. BLOSS

Atty. N. O. B. R. & V. R. R. Co.

**244 Plaintiff's Exhibit 4—Map of Diagram
of Lands.**

245

246

MAP

TOO

LARGE

FOR

FILMING



Plaintiff's Exhibit 6.—Letter of Com- 247
missioner Genl. Land Office.

F.

W. K. M.

NOVEMBER 29, 1871.

REGISTER & RECEIVER,
 Natchitoches, La.

GENTLEMEN :

By act of 3d March 1871 U. S. Stat, Vol. 16 page 579 Sec. 22, there is granted to the New Orleans Baton Rouge and Vicksburg railroad to aid in its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, to connect with the Texas Pacific railroad company at its eastern terminus, every alternate section of public land not mineral, designated by odd numbers, to the amount of Ten alternate sections per mile on each side of said railroad line where the same shall not have been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. 248

In case any of said lands shall have been sold, reserved, occupied, or pre-empted or otherwise disposed of, other lands shall be selected in lieu thereof by said Company under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named. 249

I now enclose you a diagram of that part of the road in your district north to Shreveport with the 20 mile granted limits and the 10 mile indemnity limits and you are requested to withdraw from further entry or sale all the *odd* numbered sections of land falling within those limits. The *even* numbered sections of land within the 20 mile limits you will hold at the double minimum of \$2.50 per

250 acre and allow Homestead entries at that ratatability only.

Where homestead entries have been made prior to this withdrawal, the parties will hold their lands at the minimum price, but should the entries be canceled for abandonment or other cause the lands will be, when again made subject to entry, double minimum.

This order in no manner affects the even sections in the indemnity limits.

251 You will consider these instructions as taking effect on the day of their receipt by you and you are requested to immediately acknowledge the date of their receipt.

Very respectfully,

WILLIS DRUMMOND
Commissioner.

**Plaintiff's Exhibit 7.—Resolution Board
Directors New Orleans, Baton Rouge
and Vicksburg Railroad.**

OFFICE OF THE NEW ORLEANS BATON ROUGE AND
VICKSBURG RAILROAD COMPANY
No. 150 BROADWAY NEW YORK

252

December 29th 1880.

At a Special Meeting—duly called—of the Board of Directors of the New Orleans Baton Rouge and Vicksburg Railroad Company held this day at the office of the Company there was present a quorum of the Board.

In the absence of the President of the Company *Mr. Simpson* was called to the *Chair*.

On motion duly seconded the following resolution was unanimously adopted

Resolved—That the President and Secretary of this Company be and they are hereby authorized to transfer to the New Orleans — Pacific Railway Company on such terms as they shall see fit all the right title and interest of this Company in and to the Land granted to this Company by an Act of Congress approved March 3rd 1871 entitled “An Act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road and for other purposes” and to make and execute in the name of this Company such deed or instrument as shall be necessary to complete such transfer. 253

On motion the Meeting was adjourned subject to the call of the President. 254

WM. M. BARNUM,
Secretary.

STATE OF NEW YORK }
City and County of New York } ss.

WILLIAM M. BARNUM being duly sworn says that he is Secretary of the New Orleans Baton Rouge and Vicksburg Railroad Company and that the above is a true copy of the Minutes of a Meeting of the said Company held on the 29th day of December 1880.

WM. M. BARNUM 255

Sworn to before me this 30th }
day of December 1880 }

JAS. G. JANEWAY

Notary Public (No 42)

[SEAL.]

N. Y. County

EXTRACT FROM THE MINUTES OF THE NEW ORLEANS
PACIFIC RAILWAY CO. OF FEBRUARY 3RD 1881.

“Resolved, That the President of this Company be and he is hereby authorized to accept the trans-

- 256 fer to this Company from the New Orleans Baton Rouge and Vicksburg Railroad Company, of the land grant made to the latter by the Act of Congress of March 3rd 1871: and to execute any documents necessary to evidence the acceptance of such transfer."

A true copy

WM. S. NICHOLSON

[SEAL.]

Act'g Sec'y.

File

257 **Plaintiff's Exhibit 8.—Letters from
Comr. Genl. Land Office.**

G. B. E.

"F."

FEB'Y 17TH

W. H. BARNUM, ESQ.,

Pres't of N. O. B. R. and V. R. R. Co.

SIR:

In compliance with the verbal request of Hon. J. H. Ketchum, I make the following statement:

- 258 By the twenty-second section of an act of Congress, entitled "An Act to incorporate the Texas Pacific Railroad Company" &c, approved March 3, 1871, a grant of land was made to the New Orleans, Baton Rouge and Vicksburg Railroad Company for the purpose of aiding in the construction of its road.

At a special meeting of the directors of said New Orleans, Baton Rouge and Vicksburg Railroad Company, held December 29, 1880, a resolution was adopted authorizing the President and Secretary of the Company to transfer all the right, title and interest of said Company in and to said grant to the New Orleans Pacific Railway Com-

pany, and to make and execute such instruments 259
as should be necessary for that purpose.

On the 5th day of January, 1881, the President and Secretary pursuant to said authority, executed a deed in the name of the New Orleans, Baton Rouge and Vicksburg Company, conveying all the right, title and interest of said Company in and to said grant to the New Orleans Pacific Railway Company.

On the 3rd day of February, 1881, the directors of the last named Company adopted a resolution authorizing the President of the Company to accept said conveyance, and to execute any documents necessary to evidence the acceptance. 260

There can be no doubt that when the President of the New Orleans Pacific Railway Company accepts said transfer the Company will be fully vested with all the right, title and interest which the New Orleans Baton Rouge and Vicksburg Company has in and to said grant.

Very respectfully,

J. A. WILLIAMSON
Commissioner

G. B. E.

"F."

FEB. 21 1881 261

W. H. BARNUM,

Prest. of the N. O., B. R. & V. R. R. Co.,

SIR:

The president of the New Orleans Pacific Railway Company has duly accepted in behalf of said Company the deed referred to in my letter, addressed to you, dated February 17, 1881, being the deed to the said New Orleans Pacific Railway Company by the New Orleans, Baton Rouge and Vicksburg Railroad Company of all its right, title and interest in and to the grant of land to said last named Company by the twenty-second section of

- 262 an Act of Congress entitled "An Act to incorporate the Texas Pacific Railroad Company," etc., approved March 3, 1871.

The transfer by the said New Orleans, Baton Rouge & Vicksburg Railroad Company of all its right, title and interest in and to said grant to the said New Orleans Pacific Railway Company is now complete.

Very respectfully,

J. A. WILLIAMSON
Commissioner.

263 **Plaintiff's Exhibit 9.—Telegrams from
Wheelock and others.**

Dated NEW ORLEANS 19 1881

Feb 19

To HON W H BARNUM

Prest NOBR & VRR Co W D

- In pursuance of the resolution of the Board of Directors of the New Orleans Pacific Ry Co passed Feb'y third Eighteen hundred & Eighty one I hereby accept in behalf of said Company the deed & transfer executed by the New Orleans Baton Rouge & Vicksburg Railroad Company bearing date January fifth Eighteen hundred & Eighty one Conveying all its rights title & interest into & under the Land grant made by Section twenty two of the Act of Congress approved March third Eighteen hundred & seventy one
- 264

READ THE NOTICE AT THE TOP.

THE NEW ORLEANS PACIFIC RAILWAY Co

by E B WHELOCK

91 pd 480

Prest

R Isley

Received the within this 9th day of February
1881

THE NEW ORLEANS BATON ROUGE
& VICKSBURG RAIL ROAD Co.

by W H BARNUM

Pres

Plaintiff's Exhibit 11.—Protest of Geo. 265
W. and Emma O. Cochran.

To the Honorable SAMUEL J. KIRKWOOD, Secretary
of the Interior of the United States at Wash-
ington City District of Columbia

You are hereby Respectfully notified that We the
undersigned are Owners and Holders of Certifi-
cates of stock of the New Orleans, Baton Rouge
and Vicksburg Rail Road Company amounting to
the sum of Three Hundred and twenty five Thou-
sand Dollars (\$325,000.00) and that as such stock-
holders and owners do hereby Object and Protest 266
against any assignment and transfer of the land
Grant situated lying and being in the State of
Louisiana, given to the aforesaid New Orleans,
Baton Rouge and Vicksburg Railway to the New
Orleans and Pacific Rail Road Company or to any
other Rail Road Company or any Corporation of
any character or to any Individual or Individuals
whatsoever—

And we hereby and herewith enter Our Protest
and Objection to any assignment and transfer of
said land Grant or any disposition of it in any
manner or wise without our express consent in
writing 267

GEO. W. COCHRAN
EMMA O COCHRAN

Attested by RAYMOND C GRAY Oct 17th 1881

To the
Hon S J KIRKWOOD

To the Honorable S J KIRKWOOD Secretary of the
Interior

Referring to my letter of Oct 17th 1881, to the
Honorable James B Beck which covered a protest

268 of George W Cochran and Emma O Cochran attested by me Oct 17th 1881 regarding the application of the New Orleans Pacific Railway Company for lands granted to the New Orleans Baton Rouge and Vicksburg Rail Road Company. I have the Honor to say that as the attorney of the said George W Cochran and Emma O Cochran I hereby withdraw the said Protest and all objections to the transfer or the issuing of letters Patent to the New Orleans Pacific Railway Company.

Novr 23d 1881

I have the honor to
be &c

269

RAYMOND C GRAY

**Plaintiff's Exhibit 12.—Protest from
Bissell, &c.**

Objected to by Defendant. Objection overruled.

THE NEW YORK MUTUAL IMPROVEMENT COMPANY,
(Limited.)

149 Broadway, N. W. Cor. Liberty St.

NEW YORK, Oct 20th 1881

270 HON. S. J. KIRKWOOD

Secretary of the Interior.

DEAR SIR.

As a stockholder of the New Orleans, Baton Rouge & Vicksburg Railroad Company, and claiming to be entitled to an interest in the land grant heretofore made to that Company by the act of Congress of 1871, I would beg to state that I am not yet satisfied of the regularity of the transfer of the Land Grant of that Company to the New Orleans Pacific Railway, and I beg that no patents be issued to the New Orleans Pacific Railway Com-

pany for any land that would come under the grant 271
to the New Orleans Baton Rouge and Vicksburg
Railroad Company until I shall have an oppor-
tunity of presenting to you a statement of the true
position of the matter—

That you may understand who I am, as well as
my standing and reliability, I beg to refer you to
Senator Henry M Teller—

Very Respectfully Yours

C. R. BISSELL.

NEW YORK Nov 18th/81

HON. S. J. KIRKWOOD,
Secretary of the Interior
Washington D. C.

272

DEAR SIR.

As intimated in my letter addressed to you on
the 20th ultimo., I Charles R. Bissell as a holder
of a large amount of the stock of the New Orleans
Baton Rouge and Vicksburg Railroad Company,
now enter my formal protest against the issuing of
Patents to the New Orleans Pacific Railway Com-
pany for any lands granted by the Act of Congress
of 1871 to the New Orleans, Baton Rouge & Vicks-
burg Railroad Company for the following reasons.

273

That the transfer of the grant by the New Or-
leans, Baton Rouge & Vicksburg Railroad to the
New Orleans Pacific Railway Company was made
without proper consideration and in fact without
any consideration at all to the New Orleans, Baton
Rouge and Vicksburg Railroad Company.

That the said transfer was made without being
submitted to the stockholders of said New Orleans,
Baton Rouge and Vicksburg Railroad Company
and without the knowledge of a large number of
the stockholders

That the Directors authorizing said transfer had

274 no authority to authorize the same and had not been duly elected within a year before said transfer was authorized and that the parties claiming to act as directors and authorizing said transfer were in fact "Mere Dummies" as admitted by the Secretary of said Company, and were acting in the Sole interest of the President and Secretary of the New Orleans and Baton Rouge Co. who own a large majority of the Shares of said Railway Company and are endeavoring to secure to themselves, the entire benefits arising from the transfer and sale to the New Orleans Pacific

275 I therefore beg of you, that before Patents are issued on said transfer I may be permitted to substantiate what I herein claim

Very Respectfully

C. R. BISSELL

THE NEW YORK MUTUAL IMPROVEMENT COMPANY,
(Limited.)

149 Broadway, N. W. Cor. Liberty St.

NEW YORK, Nov 19th 1881

To

HON S. J. KIRKWOOD

Secretary of the Interior.

DEAR SIR

276 Referring to my letter of the 20th ulto and my more recent one of the 18th inst regarding the assignment of the Land grant of the New Orleans Baton Rouge & Vicksburg Railway Company to the New Orleans Pacific Company, I desire to say, I wish to recall both of these letters from your files, the New Orleans, Baton Rouge & Vicksburg Company having satisfactorily adjusted all matters with me as a Stockholder, thus removing all objections I had at the date of the letters referred to, to such transfer and issuing of Patents

Very Respectfully

C. R. BISSELL

Plaintiff's Exhibit 13.—Minutes of 277
Stockholders Meeting.

MINUTES

Of a meeting of Stockholders of the New Orleans Baton Rouge and Vicksburg Railroad Company held at the office No 20 Camp St. on the 9th day of December A. D. 1881, from the hours 12. M. to 2. P. M.

The meeting having been organized by the selection of Mr. E. B. Wheelock as President and Thos. F. Maher as Secretary.

The following resolution was presented—"Resolved that the action of the Board of Directors and Officers of this Company in transferring to the New Orleans Pacific Railway Company all the right title and interest of this company to the lands granted to this company by act of Congress approved March 3rd 1871 and entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for others purposes be and it is hereby approved ratified and confirmed." 278

And said resolution having been voted upon was passed unanimously Forty two thousand seven hundred and seventy five shares (42775) voting therefor 279

The President stated that the next business in order was the election of a Board of Directors of the said Company and the following ticket of names was presented

Charles J. Canda
 N. B. Stevens
 John W. Simpson
 Charles C. Dening
 Willes Gaylord
 Lucien Birdseye

280

S. S. Brooks
 James G. Janeway
 Allan McCulloh
 Edward E Hooper
 Wm. H. Barnum
 Wm. L. Scott
 David S. Droper

281

And there being no other nominations the election was preceeded with Messrs I W. Patton and L. L. Davis of New Orleans being duly appointed Commissioners of election to receive count and return the votes and the votes having been duly cast the said Commissioners made their return which is hereto annexed and made part of these minutes as follows;

NEW ORLEANS Dec 9th 1881

We the undersigned commissioners of an election held in this City at the office # 20 Camp st to receive and count the votes cast to choose a Board of Directors of the New Orleans Baton Rouge and Vicksburg Rail Road Company, hereby certify that the following votes were cast, to wit:

	William M Barnum.....	35001	shares
	B. G Clarke.....	20	"
282	J Counsellor	600	"
	G. W. Cochran.....	6150	"
	David Smith	1000	"
	Charles C Dening.....	1	"
	James G. Janeway.....	1	"
	Allan McCulloh	1	"
	John W. Simpson.....	1	"

Total number of votes.....42775.

The said votes were cast as follows

283

FOR DIRECTORS

1 Chas J Canda.....	42775	votes	
2 N. B. Stevens.....	42775	"	
3 John. W. Simpson.....	42775	"	
4 Chas. B. Dening.....	42775	"	
5 Willis Gaylord	42775	"	
6 Lucien Birdseye	42775	"	
7 S. S. Brooks.....	42775	"	
8 James G. Janeway.....	42775	"	
9 Allan McCulloh	42775	"	
10 Edward E Hooper.....	42775	"	
11 Wm H Barnum.....	42775	"	
12 Wm L. Scott.....	42775	"	284
13 David S. Draper.....	42775	"	

J W PATTON

LAWSON L DAVIS

Commissioners

BOARD OF DIRECTORS

Charles J. Canda

N. B. Stevens

John W Simpson

Charles C. Dening

Willis Gaylord

Lucien Birdseye

S. S. Brooks

285

James G. Janeway

Allan McCulloh

Edward E Hooper

Wm H. Barnum

Wm L. Scott

David S. Draper

I hereby vote for the foregoing names as Directors of the New Orleans Baton Rouge & Vicksburg R R Company under proxy of the following stockholders Wm M Barnum 35001 shares, B. G

- 286 Clarke 20 shares J Counsellor 600 shares, G W Cochrane 6,150 shares, David Smith 1,000 shares, Chas C. Dening 1 share Jas G. Janeway 1 share, Allan McCulloh 1 share, Jno W Simpson 1 share

E. B WHELOCK

Atty.

N. Orleans Dec 9th 1881.

And it appearing by said return that Forty two thousand seven hundred and seventy five shares were duly voted for the said Candidates and that the said Candidates were duly and unanimously elected the President of the meeting so declared—

- 287 And there being no other business before the meeting, the meeting adjourned to 2 o'clock P. M.

THOS F MAHER

N O Dec 9/81

Secretary

Plaintiff's Exhibit 14.—Letters from Wheelock and others.

Objected to and objection overruled.

COPY

WASHINGTON, January 4th 1882

- 288 To

THE HON. E. W. ROBERTSON &

HON. N. C. BLANCHARD

Representatives in Congress from Louisiana

GENTLEMEN

In consideration of the withdrawal by you of the protest and objection filed by you with the Department of the Interior against the recognition of the claims urged by the New Orleans Pacific R. R. Co. to the land grant made to the New Orleans Baton Rouge and Vicksburg R. R. Co. by the Act of Congress of 1871 and now claimed by the New Orleans Pacific Co. transferees of the New Orleans

Baton Rouge & Vicksburg Co. on behalf of the said 289
 New Orleans Pacific Co. and any other railroad
 association or combination with which said New
 Orleans Pacific Co. is connected. I hereby agree,
 consent and obligate myself and the said company
 and any other company or association connected
 with it. That the right of settlers and occupiers
 of the land included within the limits of said grant
 shall be recognized and protected as follows to wit:

Settlers and occupiers of any of the lands afore-
 said up to this date shall be given the right within
 twelve months from the register of the patents is-
 sued by the Government to the said company or
 its transferees for said lands, in the office of the 290
 Clerk of the District Court and *ex-officio* Record-
 er of Conveyances and Mortgages of the parish
 where the land wanted by such settlers or occupiers
 is situated, to file their applications with the rail-
 road company through agents to be designated by
 the Co. for the purpose, for the land claimed or
 wanted by them, such settlers or occupiers shall at
 the time the title deeds are issued to them pay one
 third in cash of the price of the land so occupied or
 settled by them, and shall have one and two years
 from that time, with 6 per ct. interest in which to
 pay the remainder, mortgage and venders privilege
 to be retained by the company. 291

The price of land to be paid by such settlers or
 occupiers shall not exceed two dollars per acre, and
 the quantity of land to be claimed by each shall not
 exceed one hundred and sixty acres.

Immediately upon the register of the patents in
 the office of the Recorder of Mortgages of the par-
 ishes affected by the land grant the R. R. Co. shall
 give notice by publication for ten days in a news-
 paper published in the parish where any settlers
 or occupiers live and also by publication at the
 court house door of such parish. The fact of the
 register of the patents, and that the Co. is ready

292 to receive application from settlers and occupiers for the land wanted by them, and indicating the place where and person to whom application should be made.

Should this notice not be given immediately upon the register of the patents these settlers and occupiers are to have twelve months in which to file their applications from the time of the giving of such notice aforesaid. Proof of settlement and occupancy shall be the same as required by the laws of the United States for the acquisition of public lands, if required by the company.

Signed E. B. WHEELLOCK

293 President N. O. Pacific R'y. Co.
January 4th, 1882

Accepted on behalf of settlers and occupiers

Signed E. W. ROBERTSON

M. C. 6th. District of La.

Signed N. C. BLANCHARD

M. C. 4th. District of La.

WASHINGTON, Jan'y 4, 1882

TO THE HON. SECRETARY OF THE INTERIOR.

SIR:—

294 We hereby withdraw the opposition and protest filed by us to the recognition of the New Orleans Pacific R. R. Co. as the grantees and transferees of the land in Louisiana, granted by the act of Congress of 1871, to the New Orleans, Baton Rouge and Vicksburg R. R. Co. and claimed by said New Orleans Pacific Co. as transferees of the New Orleans, Baton Rouge and Vicksburg Co.

The object we had in filing said protest was the protection of the rights of settlers on the land covered by said grant, and as that has been obtained by agreement with the Co. we do not wish to throw any further obstacle in the way of the recognition

by the Department of the Interior of the rights 295
claimed by the company.

The New Orleans Pacific Co. have constructed the road running through the grant—that is to say from New Orleans to Shreveport—and having obtained the funds with which to do so upon the faith of its right to the land grant, we think that justice demands the recognition of their claims to the land.

We are, sir, with great respect

Your Obedient Servants

E. W. ROBERTSON

M. C. 6th Dist. of La.

N. C. BLANCHARD

M. C. 4th Dist. of La.

296

**Plaintiff's Exhibit 15.—Brief of Dillon
& Green.**

Objected to and objection overruled.

In the Matter of the transfer of the NEW ORLEANS, BATON ROUGE and VICKSBURG RAILROAD COMPANY to the THE NEW ORLEANS PACIFIC RAILWAY COMPANY of the interest of the former in lands granted to it by Act of Congress, approved March 3d, 1871, and entitled "An Act 297
to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road and for other purposes."

BRIEF TO BE USED BEFORE THE HONORABLE BENJAMIN HARRIS BREWSTER, ATTORNEY-GENERAL OF THE UNITED STATES, FEBRUARY, 1882.

Facts.

The New Orleans, Baton Rouge and Vicksburg Railroad Company is a corporation created by a

298 special Act of the Legislature of the State of Louisiana, entitled "An Act to incorporate the New Orleans, Baton Rouge and Vicksburg Railroad Company, and to expedite the construction of their road," approved December 30th, 1869.

By the terms of an Act of Congress, entitled "An Act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3d, 1871, there was granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, "its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California to said Texas Pacific Railroad Company" (see Section 22), that is, "ten alternate sections of land per mile on each side of said railroad" (see Section 9).

The purpose of Congress in chartering the Texas Pacific Company was to provide a southern route to the Pacific ocean, on or near the 32d parallel, and, pursuing the same policy that it did in the case of the Union Pacific, it adopted a *State* corporation of California (Sec. 23) to connect the main line in California with the important city of San Francisco, and a *State* corporation of Louisiana to connect the main line in Texas with the great city of New Orleans and the Mississippi river (Sec. 22). The particular company which should form the *vinculum* was immaterial to Congress, and hence the grant was made to the company named and its "successors and assigns." The main and leading purpose of Congress was to secure the connection with New Orleans and the Mississippi river, and the particular corporate organization in Louisiana was of no consequence to the general government.

A preliminary map of the route of the New Or-

leans, Baton Rouge and Vicksburg Railroad Com- 301
pany was filed in the Department of the Interior
at Washington, and lands to the amount named in
the granting act were withdrawn from settlement.

The New Orleans Pacific Railway Company is a
corporation organized under the general laws of
the State of Louisiana by a notarial charter, dated
the 19th day of June, 1875, confirmed by a special
Act of the Legislature of the State of Louisiana,
approved February 19th, 1876, which Act, besides
confirming the notarial charter, conferred upon the
company certain additional powers and franchises.

The termini of the road of the New Orleans
Pacific Railway Company are identical, and its 302
route is substantially coincident with that of the
New Orleans, Baton Rouge and Vicksburgh Rail-
road Company. The last named company, under
authority derived from its charter "to connect its
railroad with the railroads of other companies,"
having determined upon and surveyed its line, Con-
gress recognized the fact in the Texas Pacific bill
by giving aid to the New Orleans, Baton Rouge
and Vicksburgh Railroad Company, its successors
and assigns, for the construction of such line "from
New Orleans to Baton Rouge, thence by way of
Alexandria, to connect with the Texas Pacific Rail-
road at its eastern terminus" (Section 22). 303

The line of the New Orleans Pacific Railway
Company, *as constructed*, is from New Orleans to
Baton Rouge, thence by way of Alexandria, to con-
nect with the Texas Pacific Railroad, at its eastern
terminus.

The New Orleans, Baton Rouge and Vicksburg
Railroad Company, by deed dated the 5th day of
January, 1881, granted and transferred to the New
Orleans Pacific Railway Company, all its right,
title and interest in and to the lands granted to it
by the before mentioned Act of Congress incor-

304 porating the Texas Pacific Railroad Company. This transfer was approved, ratified and confirmed at a meeting of the stockholders of the New Orleans, Baton Rouge and Vicksburg Railroad Company, by a vote of two-thirds of its entire capital stock. The transfer was formally accepted by the Board of Directors of the New Orleans Pacific Railway Company.

The deed of transfer, a certified copy of the resolution of the stockholders of the New Orleans, Baton Rouge and Vicksburg Railroad Company ratifying the transfer, and a certified copy of the resolution of the Board of Directors of the New
305 Orleans Pacific Railway Company accepting the transfer, have been filed in the Department of the Interior.

A Commissioner to inspect a portion of the railroad built by the New Orleans Pacific Railway Company was, upon the application of that company, appointed by the President of the United States, and the report of the said Commissioner, approving the construction of the portion of the railroad inspected by him, was duly filed in the Department of the Interior.

Application is now made for the issuance of patents to the New Orleans Pacific Railway Com-
306 pany for the lands granted by Congress to the New Orleans, Baton Rouge and Vicksburgh Railroad Company, and by the last named company assigned to the New Orleans Pacific Railway Company as heretofore stated.

POINTS.

I.

The language of the granting act is: "there is hereby granted to said company" (the New Or-

leans, Baton Rouge and Vicksburg Railroad Company), "its successors and assigns," certain lands, but upon condition "That said company shall complete the whole of said road within five years from the passage of this act." 307

There are many precedents for the opinion that this condition is a condition subsequent. We refer among others to an opinion of Attorney General Devens dated the 26th of October, 1880 (15 Opinions Attorneys General).

In support of his opinion the Attorney General cites the case of *Schulenberg against Harriman*, 21 Wallace, 44, and says of it:

"That was the case of a grant of lands to the State of Wisconsin, to aid in the construction of a certain railroad within that State by the Act of June 3d, 1856. The language of the first section of that Act was: 'That there be, and hereby is, granted to the State of Wisconsin,' the lands specified." 308

Similar language to that found in the act granting lands to the New Orleans, Baton Rouge and Vicksburg Railroad Company: "There is hereby granted to said company."

Attorney General Devens further says of the grant to the State of Wisconsin: "In that case the grant was made upon a condition that, if the road be not completed within ten years, 'no further sale shall be made, and the lands unsold shall revert to the United States.' The road had not been completed within the time required for its construction. * * *

"Upon this state of facts, it was held, that the grants to the State of Wisconsin were grants *in presenti* * * and that the lands had not reverted to the United States, although the road was not constructed within the period prescribed, no

- 310 action having been taken to enforce a forfeiture of the grants."

The grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company was a grant *in presenti*.

Nicoll *vs.* New York and Erie Railroad Company, 2 Kernan, 121.

- It is too well settled by the judgments of the Courts and the opinions of the Attorney Generals and the practice of the departments, to need argument here, that the grant, being a present one, vested an estate in the grantee, and that until re-
- 311 voked by the Legislature, the grant remains good.

Schulenberg *vs.* Harriman, 21 Wall. 44.

Tucker *vs.* Ferguson, 22 Wall, 527.

U. S. *vs.* Leavenworth, &c., R. R. Co., 92 U. S., 745.

Grinnell *vs.* Railroad Company, 103 U. S., 739.

These cases establish that the *legal title in fee to the lands passed at once* to the New Orleans, Baton Rouge and Vicksburg Railroad Company, subject only to be defeated by the legislative action of Congress, if the road was not built within the time required by the grant.

- 312 The railroad company having, then, a vested estate, even if it be treated as one liable to forfeiture, has a right to proceed to construct the road; and until, in some form, advantage shall be taken of the breach of condition, it is the duty of the Executive Department to give the benefit of the grant to it or its assigns.

II.

The New Orleans, Baton Rouge and Vicksburg Railroad Company having acquired title to the

lands, even though a conditional title, has the power to transfer or convey them. 313

It is clear that this could not be disputed, upon general principles even without regard to the form of the Act.

WASHBURN, summarizing the law upon this point, says: "The circumstance of an estate being *subject to a condition does not affect* ITS CAPACITY OF BEING ALIENED, devised or descending, IN THE SAME MANNER AS AN INDEFEASIBLE ONE, the purchaser, or whoever takes the same by devise or descent, taking it subject to whatever condition is annexed to it."—2 Washburn Real Property, ch. 14, "Estates Upon Condition," (4th ed.) p. 23, pl. 24. 314

Furthermore, the language of the grant itself contemplates and expressly authorizes the conveyance of the lands, the grant being "to the said company, its successors and assigns."

These words were not needed to vest the fee. A corporation having perpetuity of life, a grant to it vests the whole estate, without words of succession.

Angell & Ames (3d ed.), 132.

It will probably not be questioned that, had the New Orleans, Baton Rouge and Vicksburg Railroad Company, without the aid or intervention or means of any other corporation or person, built its road as contemplated in the grant, and thereby complied with the condition named therein, it would have had the power, incident to its corporate franchises, to convey the lands had the word "assigns" been omitted from the grant. This power might also have been inferred from the policy of the Government in making grants of public lands, namely: not that railroad companies should keep the lands granted to them, but that they should distribute them to purchasers, and 315

316 thereby promote emigration and settlement of the public domain.

It would seem, therefore, that if the road had been built as contemplated, the word "assigns" would have been superfluous.

Where a fee is granted the word "assigns" has no conveyancing virtue. WILLIAMS says, "at the present day, the full transfer of estates in fee simple is universally allowed; but this liberty as we have seen, is now given by the *law*, and *not* by the particular words by which an estate may happen to be created, so that, though conveyances of estates in fee simple are usually made to *hold to the purchaser, his heirs and assigns for ever*, yet the word *heirs* alone gives him a fee simple, of which the *law* enables him to dispose; and the remaining words, *and assigns for ever*, have at the present day no conveyancing virtue at all, but are merely *declaratory of that power of alienation*, which the purchaser would possess without them." Williams Real Property, 145. Legislative grants may convey lands in fee without making use of technical words as "heirs" required in a deed.

Rutherford vs. Green, 2 Wheaton, 196.

318 Any admissible construction must give effect to the word "assigns." It can only have actual effect by holding that it manifests a consent by Congress that the company named might, so far as the general Government was concerned, alien its right to another, provided that other complied with the fundamental condition of building the road which it was the purpose of Congress to secure.

But, evidently, the word was used designedly and for a specific purpose. That purpose could be none other than to specially authorize the grantee, should it find itself unable to complete its road, to convey its interest in the lands to a company which should take up, and, aided by the grant of lands,

complete the work, thereby fulfilling the purpose 319
of Congress in donating the lands, namely: the
construction of the railroad such as would have
been built by the New Orleans, Baton Rouge and
Vicksburg Railroad Company.

The object of the grant was to promote the build-
ing of the railroad; who should build it was a mat-
ter of indifference to Congress. If another corpo-
ration, having power to construct it, did construct
it, with the assent of the New Orleans, Baton
Rouge and Vicksburg Railroad Company, the pur-
pose of the Act of Congress was fulfilled. More
especially is this so, when the last named company
assigns the grant of lands, in order to accomplish 320
the end the grantor had in view when the grant
was made.

III.

Independent of the authority contained in the
granting act, an implied power, derived from the
charter of the New Orleans Pacific Railway Com-
pany is given by the State of Louisiana to the New
Orleans, Baton Rouge and Vicksburg Railroad
Company to convey the lands in question. The
fact that no direct authority is given by the State 321
to the New Orleans, Baton Rouge and Vicksburg
Railroad Company, is explained by the fact, that
at the time the company was chartered no grant of
lands had been made by Congress and none was
contemplated.

Authority is given the New Orleans Pacific Rail-
way Company by its charter, "to obtain and receive
by purchase, grant from the United States, or
otherwise, grant, gift, devise and bequest, both real
and personal property."

From this authority to the New Orleans Pacific
Railway Company to receive, an authority to the

322 New Orleans, Baton Rouge and Vicksburgh Railroad Company, so far as the State is concerned, to grant, may be properly inferred.

This principle is stated by Folger, *J.*, in an opinion delivered by him in matter of P. P. and C. I. R. R. Co., 67 New York, 371.

323 "Power is given by statute to one corporation to form a consolidation with any other. It cannot form a consolidation unless it finds another with which to unite, and which is capable of union with it; hence, whatever other company it selects for a union and finds willing to join it, that other company, though not named in the statute, gets power from the statute to unite with that company which the statute names."

IV.

By the transfer to the New Orleans Pacific Railway Company, that company became vested with the same interest in the lands which the New Orleans, Baton Rouge and Vicksburgh Railroad Company had before, that is, a vested interest, subject only to be defeated by advantage being taken of the breach of the condition subsequent.

324

V.

The title to these lands being vested in the New Orleans Pacific Railway Company, subject to a condition subsequent, this title is absolute if the condition has been complied with; and in such case, the New Orleans Pacific Railway Company is entitled to receive patents therefor, as the proper evidence of such title.

VI.

325

The building of a road in the location mentioned in the 22d Section of the Act, by the New Orleans Pacific Railway Company is a compliance with the condition.

(a) The grant is to the New Orleans, Baton Rouge and Vicksburgh Railroad Company, its successors and assigns. As has been shown, that act operated as a grant *in presenti*, vesting title subject to the condition. The title thus vested has been transferred to the New Orleans Pacific Railway Company. There can be no doubt that the petitioner then has had an interest in the lands; it has had all the interest not retained by the Government; it has had title full and complete save that it is liable to be defeated by the breach of a condition subsequent. There would seem to be as little doubt, therefore, that it had an interest in the condition, that it had the right to perform the condition and thus make its title absolute. 326

It was settled as far back as the time of Coke, and it does not appear to have been since questioned, that where one holding title by a deed containing a condition, subsequently conveys to another, his grantee may perform the condition, although the deed in terms provided for performance only by the first taker. 327

"Also, if a feoffment be made on this condition, that if the feoffee to the feoffor, at such a day between them limited, twenty pounds, the the feoffee shall have the land to him and to his heirs; and if he fail to pay the money at the day appointed, that then it shall be lawful for the feoffor or his heirs to enter, etc., and afterwards, before the day appointed, the feoffee sell the land to another, and of this maketh a feoffment to him, in this case if the second feoffee will tender the sum of money, at the day appointed to

328

the feoffor, and the feoffor refuseth the same, &c., then the second feoffee hath an estate in the land clearly, without condition.

"And the reason is, for that the second feoffee hath an interest in the condition for the safeguard of his tenancy."

"Albeit, the second feoffee be not named in the conditon, yet shall he tender the sum because he is privie in estate, and in judgment at law hath an estate and interest in the condition.

"And note, he that hath interest in the condition on the one side, or in the land on the other may tender."

Coke Littleton, 207, *b*.

329

"It is a general rule, that any one may perform a condition who has an interest in it, or in the land whereto it is annexed.
* * * This rule is recognized by the elementary writers."

People of Vermont *vs.* Society for Propagation of the Gospel, &c., 2 Paine, 545.

"Any one who is interested in a condition of the estate to which it is attached, may perform it, and when it has once been performed, it is thenceforth gone forever."

2 Washburn on Real Property (2d Ed), p. 10.

2 Crabbe, Real Property, 815.

10 Mod., 419.

Cruise, tit. 13; Estates on Con., Ch. 2, §§ 6, 20.

Bac. Abr., tit. Condition (P), 1.

Simonds *vs.* Simonds, 3 Met (Mass.), 558.

330

(*b*) It is also a well established rule, that the law abhors forfeitures and will not defeat an estate by a strict construction of a condition, but will allow the estate to stand if the condition has been substantially performed.

In the 22d Section of the Act, Congress granted to the old company these lands in the State of Louisiana, to aid in the con-

struction of a railroad "from New Orleans 331
to Baton Rouge, thence by way of Alexandria, in said State, to connect with the said Texas and Pacific Railroad Company, at its eastern terminus." The condition is: "Provided, that said company shall complete the whole of said road within five years from the passage of this Act."

It is indisputable that a railroad, such as is here described has been built; that the purpose of Congress has been carried out; that that part of the general plan which was provided for in this section has been brought to completion; and that if what has been done by the grantee had been done by the grantor, the title to this land could not be defeated.

332

It is submitted therefore, that the condition has been substantially complied with.

It was not of the essence of the condition that the road should be built by the direct action of the original grantee.

There was nothing peculiar to the New Orleans, Baton Rouge and Vickburgh Railroad Company which made it desirable, in the view of Congress, that it, and it alone, should build the road. It is, doubtless, true that conditions might be written in a deed which would require performance by a particular person. Thus, a grant of land might be made to one skilled in architecture, upon condition that he should erect a building thereon, and it might thus be of the essence of the condition that he should himself personally perform it, with a view to the improvement of surrounding property. But there could be nothing of the kind here. Congress could not have chosen this company because of anything personal to its members or management. Its stockholders might have wholly changed, the management might have wholly changed, even while the bill was passing through Congress. Nor could it have chosen this company with reference to its corporate character, except in this, that it was a corporation of the State of

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Louisiana. Its charter might have been essentially altered at any time, without the consent of Congress. Congress did not create the company, and did not, as a condition of its grant, demand the right in any way to control its corporate management. It seems clear that Congress chose this company simply because it had the power under the Laws of Louisiana, and had apparently the purpose, with necessary assistance, to build a line of road which was deemed an important element of the Texas Pacific system. What Congress sought was to have the road built. It was not material to it who built it. But the grant was made to this particular company because it seemed that it afforded the most promise of the execution of the scheme. The building of the road by the petitioner in every way satisfied the purpose of Congress.

335

(c) It is a rule of statutory construction that the intention is to be sought and followed. The intention of Congress would evidently be satisfied by allowing to the words "said company," in the proviso, the same effect as "said company, its successors or assigns."

336

That the effect intended by Congress would be given to the act by reading the "said company" as equivalent to "said company, its successors or assigns," is shown by inference from language used in "An Act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, &c., approved July 1st, 1862. In the earlier sections of that act powers were given, lands and rights were granted to certain companies upon conditions. In Section 15 is found this clause: "Wherever the word company is used in this act, it shall be construed to embrace the words, their associates, successors and assigns, the same as if the words had been *properly* added thereto." From this it appears that it was not the policy of Congress to restrict its grants for these general railroad pur-

poses, but to make them broad in terms so that its purposes might the more certainly be carried into effect for the public good. 337

And furthermore, from the phraseology of this clause, it appears that in writing the word "company" in the earlier part of the Act, Congress had intended to include successors and assigns. "As if the words had been *properly* added thereto"—this implies that properly those words should have been added, because of the intention of Congress at the time of writing "company;" that when Congress said "company" it meant "company, their associates, successors and assigns." As those words or the ideas conveyed by them were understood, and properly should have been written out, it was provided—merely to make that intention unquestionable—that they should be inserted by construction. So, in the present case, it is submitted, that when Congress said "said company," it meant, "said company, its successors or assigns," that these words were understood and should be supplied by construction to carry out the legislative intent. It will be noticed that in the earlier sections of the Act of 1862 there had been no mention of successors and assigns, even in the granting clauses. But in the present case, the grant in Section 22 is to the company, "its successors and assigns." The introduction of these words in the granting clause, in the present case, makes the intention of Congress as to the meaning of the "said company" in the condition immediately following, almost as clear as a general clause as to construction, such as that above referred to would have done. 338

If it should be suggested that the word "successors and assigns" were introduced in the granting clause only to designate the estate granted—a claim already referred to—the case of the Central Branch Company, under the Union Pacific Railway Acts, disposes of that suggestion. Under that act of 1862 a grant of lands and bonds was made, 339

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to the Hannibal and St. Joseph Railroad Company. Not having complied with the conditions of the grant, it transferred its rights to the Atchison and Pike's Peak Railroad Company, afterwards known as the Central Branch Company. The assignee performed the conditions and asked for the bonds and lands. There is nothing in the act to authorize an assignment except the clause, above quoted. Yet the assignment has been held good, and the performance of the conditions by the assignee, has been held to be sufficient to give unconditional title to the bonds and lands.

341

Mr. Secretary Delano, on January 2, 1872, gave it as his opinion: That the Central Branch Company is the rightful assignee of the Hannibal and St. Joseph Railroad Company, through an assignment by the latter company, to the Atchison and Pike's Peak Railroad Company, which is now the said Central Branch Company; that said assignment is in due form, and should be recognized in accordance with the opinion of Attorney General Stanbery; that said Central Branch Company is entitled to its land grant for one hundred miles next to and west of the Missouri river."

The following are copies of opinions of Attorney General Stanbery and Solicitor of the Treasury Jordan.

342

WASHINGTON, D. C., July 25, 1866.

TO HON. HUGH McCULLOCH, Secretary of the Treasury:

SIR: I have examined the letter of the Solicitor of the Treasury of the 24th inst. in relation to so much of the Pacific Railroad Act of July 1, 1864, as provides for the issue of U. S. bonds to the Hannibal and St. Joseph Railroad Company. I have also examined the documents accompanying the letter, and I am of opinion that the assignment made by said railroad company to the Atchison and Pike's Peak Railroad Com-

pany is valid, and that, upon the performance of the conditions required by the Act, the last-named company will be entitled to receive the bonds as such assignee. 343

I have the honor to be

Yours very respectfully,

HENRY STANBERRY,
Attorney General.

TREASURY DEPARTMENT,
SOLICITOR'S OFFICE,

July 26, 1866.

SIR—I have the honor to return herewith the papers relating to the completion by the Atchison and Pike's Peak Railroad Company of the first section of twenty miles of its road, and to say that these papers show the completion of said section, and that said company is entitled in consideration thereof to receive United States bonds of the denomination of one thousand dollars, to the amount of sixteen thousand dollars per mile of said section. The bonds should be dated the 19th inst. 344

There is no objection to the insertion of the words "Assignee of the Hannibal and St. Joseph Railroad Company" after the name of the Atchison and Pike's Peak Railroad Company.

I have the honor to be 345

Very respectfully,

EDWARD JORDAN,
Solicitor of the Treasury.

HON. HUGH McCULLOCH,
Secretary of the Treasury.

(d) It is believed that it is quite frequently the case, that the words "successors and assigns" are omitted in the subordinate portions of a deed or statute where they must be understood to give the intended force

346

to the language. Take the case of a mortgage. The conveyance is to the second party, his heirs or assigns. The mortgage contains a provision that, if the mortgagor fails to pay taxes, or to keep the premises insured, "the said second party" may pay, or insure in his stead. Would it be doubted that the assignee of the mortgage would have the right to pay taxes and insure equally with the original mortgagee, though there were no mention of assigns in this provision?

247

(c) But it would be no unwarrantable use of language to say that the New Orleans, Baton Rouge and Vicksburgh Railroad Company has built this road. *Qui facit per alium facit per se*. If the old company had employed the petitioners as a constructing company to build for it, there would be no doubt that in law the road would be held to have been built by the "said company."

348

Suppose that to the construction agreement had been added a provision that when the road was completed, the constructing company might purchase it at a fixed price. This would not have changed the aspect of things with respect to the performance of the condition. Suppose that the New Orleans, Baton Rouge and Vicksburgh Railroad Company had said to the petitioners, build this road for us and pay us \$50,000 and we will give you the road and the land. Would there have been anything in the transaction offensive to the spirit or the letter of the law? Now then, did not the New Orleans, Baton Rouge and Vicksburgh Railroad Company in effect build this road by what they did, did they not at least equally comply with the spirit of that condition and equally serve the purpose of Congress? The New Orleans, Baton Rouge and Vicksburgh Railroad Company became embarrassed. It was unable itself directly to carry out the plan for which it was incorporated and the plan which Congress had made for it. So apparent was this to capital-

ists that this new company was formed. So 249
 apparent was it to the Legislature of
 Louisiana that it ratified the new company
 and gave it a special charter to enable it to
 carry out this same plan. Then the old com-
 pany, to aid in the construction of the very
 road which Congress meant to have built,
 to bring about the building of its road, in
 other words, transferred to the petitioner
 the lands which Congress had granted to it.
 These lands were relied upon by the new
 company, and by reason of this reliance the
 road was built. Is it not an entirely proper
 construction, then, to say, under the inter-
 pretation which the law gives to conditions
 intended to defeat estates, that "the said
 company" has built the road? 350

(f) Mortgages of such land grants, made
 before performance of such conditions, are
 very common and have been universally ap-
 proved. In one case a Receiver was ap-
 pointed to prevent the grant from lapsing,
 and was authorized to borrow money to com-
 plete the road so as to comply with the con-
 dition.

Kennedy *vs.* St. Paul & Pac. R. R. Co., 2
 Dillon, 448.

See also Jerome *vs.* McCarter, 94 N. S., 734.

The *very object of such a land grant* is to enable
 the company with the aid of the lands thus granted,
 to raise the means of constructing the road. All of 351
 the land grant roads, we believe without exception,
 have executed mortgages of their lands IN ADVANCE
of construction. The Union and Kansas Pacific,
 the Texas Pacific and Northern Pacific notably,
 have done this. Other land grant roads have done
 the same; and such mortgages have been foreclosed,
 and the right of the original mortgagor judicially
 divested and transferred by sale under decrees of
 foreclosure to *new* companies, which have built the
 roads and earned the lands and received the patents.

- 352 An instance of this will be found in Grinnell *vs.* R. R. Co., 103 U. S., 739.

A mortgage is an assignment *sub modo* at first, and complete on foreclosure and sale.

The very idea of a mortgage involves the power *to assign, to alienate*, and it necessarily carries with it the right of the mortgagee or purchaser at the foreclosure sale, to perform the condition and save the grant.

- 353 What is the difference in legal effect between such a case and the one now here presented? In each case the road is built and the condition performed by an *assignee*, and not by the original grantee. If the New Orleans Pacific Railway Company had bought these lands at a foreclosure sale, under a mortgage covering the land grant made by the New Orleans, Baton Rouge and Vicksburg Railroad Company, and then had done just what it has now done, viz., built the road, no one would or could question its right to the lands. What difference does it make that it took in the first instance an *absolute*, instead of a conditional transfer of the original grantee's rights?

VI.

354

If what has been said is correct, then the petitioner is entitled to the lands and patents should issue.

If any special authority for executive action is needed it is found in section 12.

Section 22 refers to section 12, and substantially makes it part of it.

"Whenever the said company shall complete the first and each succeeding section of twenty consecutive miles of said railroad. * * it shall be the duty of the Secretary of the Interior to cause patents to be issued, &c."

"The said company" here refers to the Texas Pacific Railroad Company. No argument is to be derived, therefore, in this connection, from the use of those particular words. The effect of section 22 and 12 together is, that patents shall be issued for every twenty miles as the condition shall be complied with. 355

The question of executive duty is to be determined, therefore, in the same way as the question of title. If we have shown that the title has become absolute, we have also shown that patents should be issued.

JOHN F. DILLON,
ASHBEL GREEN, 356
Of Counsel.

Summary of the Brief.

It has been the eminently wise policy of this Government, by liberal grants of land, to induce railway corporations to extend their roads into the wilderness, and thus create productive fields and populous towns, when, but for this, all would still remain an inaccessible waste.

The Government did never intend to lure its citizens into large expenditure for the enrichment of the public domain and then break the word of promise by withholding the reward which the builders of the roads justly expected. 357

In this case, look at the undisputed

Facts.

The State of Louisiana incorporated the Baton Rouge Railroad Company December 30th, 1869.

By the Act of Congress which incorporated the Texas Pacific road, March 3d, 1871, there was

358 granted to the Baton Rouge road "ITS SUCCESSORS
AND ASSIGNS" "ten alternate sections of land per
mile on each side of said railroad (Sec. 9 and
Sec. 22).

The Baton Rouge road filed a preliminary map of
their route in the Interior Department, and the
lands named in the act were withdrawn from set-
tlement. The Baton Rouge company not having
the means to complete the road, by deed dated Jan-
uary 5th, 1881, granted, sold and transferred all its
right, title and interest in and to the lands granted
to it by the Act of Congress before mentioned, unto
the New Orleans Pacific R. R. Co., a corporation
359 created by an Act of the Legislature of Louisiana,
February 19th, 1876.

This latter company have built the road which
the original company were to have built.

A Commission to inspect a portion of the road of
the latter company (the N. O. P.), appointed by the
President, on application of the said company, and
the report of said Commissioners approving the
construction of the part so inspected was duly filed
in the Department of the Interior.

We now ask that patents for the lands granted as
above stated, may issue to the New Orleans Pacific
Company who have built the road just as their as-
signors, the Baton Rouge Railway Company had
360 agreed to build it.

There is no contest between the two corporations,
and the only question is whether the company which
built the road is entitled to the patents.

First.

It is clear that, if the Baton Rouge Co. had built
the road just as the N. O. P. Co. have built it, the
Baton Rouge corporation would be entitled to the
patents.

The grant was to the Baton Rouge Co., "*its successors and assigns,*" and the New Orleans and Pacific *are the assigns*, and have fulfilled the conditions which would have entitled the assignors to the patents if performed by them, the Government looking on, seeing the work done, as well as directly assenting, by the act of the President in appointing a Commissioner, *on the application of the N. O. P.*, which Commissioner approved the work, and filed his report in the Interior Department; and hence the New Orleans Pacific Road are entitled to the patents. 361

If Mr. A. owning eighty thousand acres of wild land, agrees with Mr. B. and his assigns to give twenty thousand acres of these lands upon completion of a road to be approved by an engineer, whom Mr. A. shall appoint, and Mr. B. not being able to build the road assigns his contract to Mr. C., who completes the road, and on application of Mr. C. Mr. A. appoints an engineer, who approves the work which he (Mr. A.) has seen built by the assignee; what show would Mr. A. have in a Court of Justice in attempting to withhold the twenty thousand acres of land from Mr. C.? 362

Second.

363

It is suggested that the act granting the land to the Baton Rouge Company contains this clause, "that said company shall complete the whole of said road within five years from the passage of this act."

This is true, but it makes no difference, the act does not forfeit the grant and no subsequent act has touched it, and the work has been completed with the knowledge and approval of the Government as above shown.

Every lawyer knows that even when a building

364 contract provides that if the work is not all done within one year no payment shall be made for any further work, yet if at the end of the year the building is but half finished and the builder goes on with the knowledge of the owner and completes the building, though it take another year, the full price of the contract can be recovered by the builder.

Third.

365 The language of the Act making the grant to the Baton Rouge Company is: "*There is hereby granted to said company.*" This is clearly a grant *in presenti*.

It was so held by the United States Supreme Court, Marshall, *C. J.*, in 1817 in the case of Rutherford *vs.* Green's heirs.

In 1875 the same was held (92 U. S. R., 741), also (21 Wallace, 44-61).

2 Kernan, 121.

Att'y Gen. Devens, Oct., 1880.

Fourth.

366 That the condition attached to the grant could be performed by the assignee, the party interested in its performance, and that the New Orleans and Pacific Company could take by assignment cannot be doubted (see authorities cited above).

A great government does not take sharp technical advantage of its citizens who have acted in good faith and with mutual benefit.

EDWARDS PIERREPONT,
Of Counsel.

Plaintiff's Exhibit 16.—Report of Senator Jonas. 367

Objected to; objection overruled.

47TH CONGRESS, {	SENATE.	{REPORT
1st Session. }		{No. 711.

IN THE SENATE OF THE UNITED STATES.

JUNE 7, 1882.—Ordered to be printed.

Mr. JONAS, from the Committee on Railroads, submitted the following 368

REPORT:

The Committee on Railroads, to whom the subject was referred, submit the following report:

A petition has been referred to the Committee on Railroads of certain citizens of Louisiana, asking for the forfeiture of the land grant made to the New Orleans, Vicksburg and Baton Rouge Railroad Company by the ninth section of the act entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, on the ground that the company to whom the grant was made has failed to build the road within the time prescribed by the act. 369

The grant was made to the New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns. That company was incorporated by an act of the legislature of Louisiana, approved December 30, 1869. The object of Congress in making the grant was to aid in the construction of the proposed road from New Orleans, via Baton Rouge, Alexandria, and Shreveport, to

370 connect with the eastern terminus of the Texas Pacific Railroad, and thus connect that road with the Mississippi River and the Gulf of Mexico.

The committee find that this connecting road, on almost the same line, and between the same points (if not built by the original grantees), has been built by the New Orleans Pacific Railway Company, which was organized under a charter confirmed by an act of the legislature of Louisiana, approved February 19, 1876. This road is now completed and running between New Orleans and the eastern terminus of the Texas Pacific Railroad, at or near Marshall, Texas, its route being via Baton Rouge, Alexandria, and Shreveport.

371 The New Orleans, Baton Rouge and Vicksburg Railroad Company (which still has corporate existence), by deed dated the 5th day of January, 1881, granted and transferred to the New Orleans Pacific Railway Company all its right, title, and interest in and to the lands granted to it by the before-mentioned act of Congress incorporating the Texas Pacific Railroad Company. This transfer was approved, ratified, and confirmed at a meeting of the stockholders of the New Orleans, Baton Rouge and Vicksburg Railroad Company, by a vote of two-thirds of its entire capital stock. The transfer was formally accepted by the board of directors
372 of the New Orleans Pacific Railway Company.

The deed of transfer, a certified copy of the resolution of the stockholders of the New Orleans, Baton Rouge and Vicksburg Railroad Company ratifying the transfer, and a certified copy of the resolution of the board of directors of the New Orleans Pacific Railway Company accepting the transfer, have been filed in the Department of the Interior.

A commissioner to inspect a portion of the railroad built by the New Orleans Pacific Railway Company was, upon the application of that company, appointed by the President of the United

States, and the report of the said commissioner, 373
approving the construction of the portion of the
railroad inspected by him, was duly filed in the De-
partment of the Interior.

Application is now made for the issuance of
patents to the New Orleans Pacific Railway Com-
pany for the lands granted by Congress to the New
Orleans, Baton Rouge and Vicksburg Railroad
Company, and by the last named company assigned
to the New Orleans Pacific Railway Company, as
heretofore stated.

The grant was originally made to the New Or-
leans, Baton Rouge and Vicksburg Railroad Com-
pany, its successors and *assigns*, for the purposes 374
above stated.

The road has been built by the assignee of the
grantee, and the objects of the grant have been fully
attained.

No forfeiture of the grant was made before the
completion of the road, on the grounds alleged, and
we think it would be unjust and inequitable to
make such forfeiture now when the work has been
completed by the assignee company, which has built
the road in good faith and in full expectation of
receiving the benefit of the grant which remained
unforfeited and assignable in the control of their
grantor.

Your committee think no consideration of public 375
policy requires the forfeiture of the grant, and they
recommend that the committee be discharged from
further consideration of the memorial.

376 **Plaintiff's Exhibit 17.—Affidavit of
Grenville Dodge.**

IN THE MATTER OF THE APPLICATION OF THE NEW ORLEANS PACIFIC RAILWAY COMPANY AS ASSIGNEE OF THE NEW ORLEANS, BATON ROUGE AND VICKSBURG RAILROAD COMPANY, FOR CERTIFICATES OR PATENTS TO THE LANDS GRANTED BY SECTION 22 OF THE ACT OF CONGRESS OF MARCH 3RD, 1871, NOW PENDING BEFORE THE DEPARTMENT OF THE INTERIOR:

377 GRENVILLE M. DODGE being duly sworn deposes and says: that he is the President of the American Railway Improvement Company; that the said Company on the 31st day of July A. D. 1880 entered into a contract with the New Orleans Pacific Railway Company to construe its road from New Orleans to Shreveport in the State of Louisiana; that on the 29th day of December 1880 by resolution of the Board of Directors of the New Orleans Baton Rouge and Vicksburg Railroad Company, all the right, title and interest of that company in and to the aforesaid grant of land made by the 22nd section of the said Act of Congress, was transferred and conveyed to the New Orleans Pacific Railway Company, and as this affiant is advised and believes, approved and ratified by the stockholders thereof.

378

The route of the New Orleans Pacific Railway Company begins at New Orleans and extends to West Baton Rouge, thence by way of Alexandria to Shreveport. The course, direction and general route of the road contemplated to be built by the New Orleans, Baton Rouge and Vicksburg Railroad Company, and the one chartered to be built and actually built by the New Orleans Pacific Railway Company from New Orleans and Shreveport are

substantially the same, and the road of the New Orleans Pacific Railway Company is constructed within the limits of the lands withdrawn for the New Orleans, Baton Rouge and Vicksburg Railroad Company. The length of the road constructed of the New Orleans Pacific Railway Company between New Orleans and Shreveport is 333 miles, all of which road is now constructed and in actual operation and was constructed by the American Railway Improvement Company for the New Orleans Pacific Railway Company under the contract aforesaid, by the terms of which the New Orleans Pacific Railway Company was entitled to the land grant in question. The portion of the road between New Orleans and White Castle, a distance of sixty-eight miles was acquired from another company, and repaired and put in order by the American Railway Improvement Company under its contract with the New Orleans Pacific Railway Company, from New Orleans to Donaldsonville. When the road between New Orleans and Donaldsonville was originally built, affiant does not know. 379 380

The road of the New Orleans Pacific Railway Company from White Castle to Shreveport, including branch to West Baton Rouge, a distance of about 268 miles, was wholly built by the American Railway Improvement Company under said contract with the exception of a small amount of grading which had been previously done by the New Orleans Pacific Railway Company, but was of very little value. From Donaldsonville to White Castle, a distance of about 10 miles, the road had been originally built by the same company which constructed the road from New Orleans to Donaldsonville; but the American Railway Improvement Company, contractor as aforesaid, was obliged to rebuild the same. A list of stations and distances on 381

382 the New Orleans Pacific Railway is attached hereto.

GRENVILLE M. DODGE

Sworn to before me this 17th }
day of October, 1882. }

HENRY E. WALLACE

Notary Public

New York, #165

NEW ORLEANS AND PACIFIC RAILWAY.

STATIONS AND DISTANCES.

New Orleans to

383	Gretna	3	miles
	Westwego Junction.....	10½	"
	St. Charles.....	26	"
	St. John.....	36	"
	St. James.....	52	"
	Donaldsonville	65	"
	Bayou Goula.....	78	"
	Plaquemine	85	"
	Baton Rouge Junction.....	90	"
	Grosse Tete.....	102	"
	Atchafalaya	129	"
	Petite Prairie.....	146	"
	Cheneyville	171	"
384	Lecompte	179	"
	Alexandria	195	"
	Pleasant Hill.....	269	"
	Mansfield	287	"
	Shreveport	325	"

Branchroad:

Baton Rouge Junction to West Baton

Rouge 8 miles.

**Plaintiff's Exhibit 19.—Letter from
Hon. L. E. Payson.**

385

HOUSE OF REPRESENTATIVES,

WASHINGTON, D. C., Dec. 15th, 1882

HON. HENRY W TELLER,

Secy &c.—

DEAR SIR.

In October last I had the honor to address you (as well as the President) a note on the subject of the land grant made in aid of the construction of the M. B R. & V. R R Co. now claimed by the N O. R. Ry Co. in which letters I requested a suspension of department action, until I could, as a member of the Judiciary Committee of the House, be heard upon the matter,—as it was pending before that committee on a resolution offered by myself, declaring a forfeiture of the grant—and that the legal question, as I understood it was identical with that involved in the Texas Pacific grant, now claimed by the Southern Pacific R. R. Co; and that also, the rights of many settlers, in good faith were involved, so that in my judgment, action might properly and should be delayed, until further investigation should be had, as well to the status of the grant, as to the protection of parties in possession, as settlers on the public domain, claiming adversely to the R. R. Co.

At the date of my writing, the matter had not been examined in committee, and all that was known to me was what appeared in the opinion of the Atty-General of date June 13, 1882 and the public statutes.

You kindly held the matter, as I desired, until my arrival here, and until I could examine the matter to my satisfaction, and as I have concluded that under the law, as well as the equities of the case,

386

387

388 the N. O. P. Ry Co is entitled to the grant, (except as to 68 miles of road referred to below, as purchased, instead of constructed) it is only proper that I should state to you, the additional facts I have gleaned since my return here bearing on the case.

I find that the N O. B R. & V. R R Co. had been struggling for years to obtain credit with which to build the road, but was unsuccessful; that the N O. P. Ry Co,—having the same terminal points viz: New Orleans and Shrevesport, and its line of route, practically co-incident, throughout its entire length with that of the N O. B R. & V. R R Co. and all its
389 line to within and near the middle of the grant (an important fact not so stated to me last session nor so understood,) ; purchased of the N O. B R & V. R R Co. the grant for the purpose of utilizing it in the building of its R. R. to connect the two cities and making connection between San Francisco and New Orleans, as contemplated by the granting act.

I find that on Dec. 9, 1880, the N O. B R. & V R R Co. resolved to convey this grant to the N O. P. Ry. Co.

That on Jan'y 5, 1881, the same Co. made a conveyance to the last named Co. of the grant. That on February 3d 1881, this deed and conveyance was
390 accepted by the N O. P. Ry. Co.

That before the N O. P. proceeded with the building of its road, or obtaining money therefor, the opinion of the Interior Dept was sought as to the validity of the transfer; and on that date the Commissioner of the General Land Office wrote the President of the Co that "When the President of the N O. P Ry Co. accepts the transfer made by the resolution and deed of the N O. B R. & V. R R Co. it, the N O. P Ry Co. will be fully vested with the right to the grant."

On Feby 21, 1881 after the Department was notified that the grant had been conveyed to and ac-

cepted by the N O. P. Ry Co, the Commissioner of the General Land Office wrote the President of the Co. after reciting the facts as to the conveyance "that the transfer by the N O. B R. & V R R Co. of all its right title and interest in and to the said grant to the said N O P. Ry Co is now complete." 391

Upon this recognition, the N O. P. Ry Co. proceeded to build and complete its road, basing its expenditures for that purpose upon faith in the validity of the transfer and the opinions of the Commissioner.

In the construction of its line, however, it utilized 68 miles of road, purchased of Morgans Louisiana & Texas R. R. & Steamship Co. extending from Westmego to White Castle, which piece of road had been built before the granting act was passed. 392

I find, also, that the road was recognized as a land grant road, after the conveyance, and during its construction, by Secy Kirkwood in his annual report for 1881. Ex. Doc. 1, pt. 5 p. 16, that "130 miles of the N O P. have recently been examined, but not accepted, and that 123 additional miles are now ready for examination" and in later department documents the same recognition.

Beside the opinion of the Att'y General, that the N O P. is legally entitled to the grant, I see the Senate Committee on Rail Roads has unanimously reported in favor of N O P. Ry Co's right to the grant and that there are no considerations of public policy requiring any interference with it. 393

I have ascertained by conference with them that the Senators both—and the delegation in the House from Louisiana do not favor forfeiture; interposing no objection to immediate action.

On the question of the rights of settlers, I am advised by several of the members of the House

394 from Louisiana—some of whom representing the districts in which the major part of this grant lies participated in the drawing of the agreement—that the claimant Co. has contracted and bound itself, that all settlers on the sections allotted to the R R. Co shall be protected and have their lands at a price not exceeding two (2) dollars per acre, on deferred payments at low interest.

That contract is now before me, having been submitted by one of the La. delegation most interested, and in my judgment fully protects the settlers.

395 The difference between the Texas Pacific case and this to me is that this road was constructed on the faith of the grant and before adverse opposition or action; the Southern Pacific was built by a Company asserting that it neither would nor wanted Government aid & without reference to a grant.

These considerations dispose of my objections entertained at the last session (and indicated in my letters to you and the President) to proceeding under the act, and I withdraw the request I made relative to suspension of action until I could investigate and be heard. I owe you an apology for the length of this communication; but as you know, I have always taken a decided stand as to all land grants wherein there was either a failure of performance or not strong grounds for equitable consideration as to declaring forfeitures.

396 In this case I am satisfied from the facts and for the reasons stated, that it would be improper for me further to interfere & that it would be unjust and inequitable to do so; that the rights of the settlers are fully protected, and I shall at the earliest opportunity in committee withdraw the resolution I have offered for the forfeiture of this grant.

Thanking you for the consideration shown me I remain,

Yours truly,

L. E. PAYSON.

HOUSE OF REPRESENTATIVES U. S.,

397

WASHINGTON, D. C., Dec 15, 1882

HON. H. W. TELLER,
Secy &c.

DEAR SIR.

Referring to my letter of this date, I have the honor to state that, at the meeting of the Judiciary Committee this day, I formally withdrew the resolution pending, which I offered last session.

Yours truly

L. E. PAYSON

398

**Plaintiff's Exhibit 20.—Letter from
Comr. Genl. Land Office.**

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

WASHINGTON, D. C., Apr 19, 1883

HON. H. M. TELLER,
Secretary of the Interior

SIR:

I am in receipt of your letter of the 19th ult. transmitting, for appropriate action, a copy of your letter of the 13th inst., to the President, inclosing two reports of Mr. Thomas Hassard, Commissioner, on 328 miles of the New Orleans Pacific Railroad, in Louisiana, and recommending that the said 328 miles of road be accepted, less and exclusive of 68 miles thereof extending from New Orleans to White Castle, and that patents for such lands as may have been earned by the construction be issued to the New Orleans Pacific Railway Company, (exclusive of lands along said 68 miles), on their compliance with the law and regulations,—with the President's

399

400 endorsement thereon approving the recommendations.

You also transmitted two maps showing the line of route of said New Orleans Pacific Railroad as constructed from the west bank of the Mississippi River, opposite New Orleans, to Shreveport, Louisiana. These maps bear the sworn certificate of the Chief Engineer of the company to the effect that the several sections of road represented thereon as constructed have been completed and equipped as required by law. They also bear the certificate of the President of the company that the location of the road as represented thereon is correct and has been
401 approved by the company, and that the several sections of the road have been completed and equipped.

One of said maps, showing three sections comprising 130 miles of constructed road, was referred to this office by the Department on the 19th Dec., 1881, for report. In my letter of Dec. 24th, 1881, returning the same, I recommended that in case the sections of constructed road were accepted by the President, the map be transmitted to this office, with authority to treat the same as showing the definite location of the line, to the extent of the constructed road. As said map also shows a line, between the sections of constructed road, supposed to be the line
402 of the proposed road, I suggested that as to such portion the map should not be accepted as evidence of, nor treated as the definite location of the line, for the reason that the same is not executed in the form and manner required by existing regulations.

I further recommended, that in the event of the recognition of any portion of the grant as inuring to the New Orleans Pacific Railway Company, the selection and certification of lands be restricted to the limits already withdrawn on the maps of general route filed by the New Orleans, Baton Rouge and Vicksburg Railroad Company.

In your letter of the 19th ult. you overlooked

these recommendations, and failed to advise this office of your acceptance of any map or maps, as showing the line of definite location. 403

The 22d section of the Act of Mar. 3, 1871, grants to the New Orleans, Baton Rouge and Vicksburg Railroad Company, (of which the New Orleans Pacific Railway Company is the assignee), its successors and assigns, the same number of alternate sections of public lands in the State of Louisiana, as are by said act granted in the State of California to the Texas Pacific Railroad Company. The lands granted by said act in the State of California to the Texas Pacific Railroad Company, are ten alternate sections of public land per mile, not mineral, designated by odd numbers, on each side of said railroad line, as such line may be adopted by said company, where the same shall not have been sold, reserved or otherwise disposed of, or to which a preemption or homestead claim may not have attached at the time the line of said road is definitely fixed. 404

As the company is entitled to such lands only as had not been sold, reserved or otherwise disposed of, or to which a preemption or homestead claim had not attached at the time the line of its road was definitely fixed, the date of the definite location of the road becomes an important factor in the adjustment of the grant. But as to what constitutes "definite location" the act is silent. In the case of *Van Wyck v. Knevals*, decided by the Supreme Court at October Term, 1882, the line of the St. Joseph and Denver City Railroad, Act July 23, 1866; 14 Stats., 110), was held to have been definitely fixed when, through the filing with and the acceptance of a map thereof by the Secretary of the Interior, it had ceased to be the subject of change at the will of the company. The Department has generally held that a road is definitely located when the line is so fixed that it cannot thereafter be changed in any material 405

406 particular without the authority of the granting power. (See Copps L. O., Vol. 1, p. 164).

As the maps of constructed road on file do not show either the date of the adoption of the line by the company, or the dates of the completion of the several sections of constructed road, and as the road was accepted without any reference to definite location, this office is without the information necessary to enable it to proceed intelligently in fixing the date of the definite location of the road, unless the President's acceptance be considered as such.

I therefore respectfully ask for instructions as to what act, or acts, this office shall treat as the definite
407 location of said railroad.

Should the adoption of the line by the company or the actual construction of the road, be held to be the definite location, it will be necessary for the company to show the date, or dates, of such action. Should you hold the President's acceptance to constitute definite location, no further evidence is necessary.

Regarding my recommendation that the selection and certification of lands be restricted to the limits already withdrawn on the line of general route, I will state that some doubts as to the propriety of such action have since arisen in my mind. The
408 lands granted are ten alternate sections per mile on each side of such line as the company may adopt. Until the line is definitely located the grant is in the nature of a float attaching to no particular sections. The right of the company does not attach until the line is definitely located, and then to the odd numbered sections on each side of such line.

It has been the custom in grants of this class, where the lands have been withdrawn on a line of general route before the definite location, to adjust the withdrawal so that it may conform to definite location.

On this point see your letter of Nov. 22, 1882, di-

recting an adjustment of the withdrawal for the 409
Northern Pacific Railroad Company.

In the present case the line of constructed road is, for its entire length, within the twenty mile (granted) limits of the withdrawal on the line of general route, the greatest deviation being about ten miles.

In the event of an adjustment of the withdrawal to the line of definite location the rights of settlers upon any lands outside of the existing limits, but which may fall within the changed limits, will be fully protected.

This for the reason that in the new indemnity limits entries will of course be allowed up to the 410
date of withdrawal, and the change in the granted limits will not be sufficient to throw any of the granted lands outside of the existing indemnity limits.

Should you conclude to direct an adjustment of the withdrawal to conform to definite location, I respectfully ask to be informed whether I am authorized to recognize both withdrawals, or only that on the line of definite location. In other words will a settlement initiated prior to definite location on lands within the limits of both withdrawals except such land from the grant.

So far as the granted lands are concerned, the 411
12th section of the Act of Mar. 3, 1871, directs that they shall be withdrawn from preemption, private entry and sale upon the filing of the map designating the general route of the road. There appears to have been no authority for the withdrawal of the indemnity lands on the filing of the map of general route.

On the other hand, should you decline to direct an adjustment of the withdrawal should the selecting and patenting of the granted lands be restricted to such as are within twenty miles of the line of definite location, or may such lands be selected anywhere within the twenty mile limits of the with-

- 412 drawal on the line of general route, without regard to their location with respect to the line of definite location.

Questions as to the terms of future withdrawals of lands for indemnity purposes are now before you, having been raised by my letter of Jan'y 22, 1883, asking for instructions in the matter of the grant to the Northern Pacific Railroad Company.

I am, sir, very respectfully,

your obedient servant,

N. C. MCFARLAND
Commissioner.

413 **Plaintiff's Exhibit 21.—Letter from
Wheelock, Pres.**

TEXAS AND PACIFIC RAILWAY COMPANY,
197 Broadway. (Western Union Building.)

NEW YORK, May 23rd. 1883.

Hon. LUTHER HARRISON,

Actg. Commr. General Land Office,
Washington, D. C.

SIR:

- 414 Yours of May 22d. was duly received. I accept the dates of the definite location of the New Orleans Pacific Railway as fixed by you and have no appeal to make from your decision. You will please make the necessary orders to the land offices at New Orleans and Natchitoches to recognize the definite location as decided by you. Please inform me how soon you will furnish a map to these offices showing the limits of the grant. If it can be expedited by my Co. paying for any additional force needed to prepare the map, I shall do so with pleasure.

I take it for granted that there can be no further question to decide, as the definite location once determined the limits of the grant are readily defined.

Very respectfully

E. B. WHELOCK,
President

New Orleans Pacific Rwy. Co.

Plaintiff's Exhibit 22.—Letter from 415
Comr. Genl. Land Office.

MAY 22 3

E. B. WHEELOCK, Esq.,
 President N. O. P. Ry. Co.,
 New York City.

SIR:

On the 19th Mar., last, the Hon. Secretary of the Interior transmitted to this office a copy of his letter of the 13th Mar. to the President, inclosing two reports of Mr. Thomas Hassard, Commissioner, on 328 miles of the New Orleans Pacific Railroad in Louisiana, and recommending that said 328 miles of road be accepted, less and inclusive of 68 miles thereof extending from New Orleans to White Castle, and that patents for such lands as may have been earned by the construction be issued to the New Orleans Pacific Railroad Company, with the President's endorsement thereon approving the recommendations. 416

The Hon. Secretary also transmitted two maps showing the line of route of said road as constructed from New Orleans to Shreveport.

One of said maps shows three sections, comprising 130 miles of road, as follows: Sixty miles extending from a point on the Mississippi River, opposite New Orleans, to a point near Donaldsonville; twenty miles extending from a point in Town. 2 N. Range 1 E. to a point in Town. 4 N. Range 2 W., and fifty miles extending from the junction with the Texas and Pacific Railway, in Shreveport, La., to a point in Town. 10 N. Range 12 W. This map was filed in the Department Oct. 27, 1881. 417

The second map, which was filed in the Department Nov. 17, 1882, covers such portions of said road as are not shown upon the first map.

The said maps bear the affidavits of the Chief

418 Engineer, and Acting Chief Engineer, respectively, (sworn to Oct. 17, 1881, and Nov. 11, 1882, respectively), to the effect that the sections of road shown thereon have been completed and equipped as required by law, and that the line of route shows the correct location of the road.

They also bear your certificate as President of the company, to the effect that the location of the road as represented thereon is correct and has been approved by the company, (date or dates of such approval not given), and that the road has been completed and equipped as required by law.

419 The Act of March 3, 1871,—22d section,— grants to the New Orleans, Baton Rouge and Vicksburg Railroad Company, (of which the New Orleans Pacific Railway Company is the assignee), its successors and assigns, the same number of alternate sections of public lands per mile in the State of Louisiana as are by said act granted in the State of California to the Texas Pacific Railroad Company. The lands granted by said act in the State of California to the Texas Pacific Railroad Company, are ten alternate sections of public land per mile, not mineral, designated by odd numbers, on each side of such line as the company may adopt, where the same shall not have been sold, reserved or otherwise disposed of, or to which a preemption or homestead claim may not have attached at the time the line of
420 said road is definitely fixed.

You will readily observe from the terms of the grant that the date of the definite location of the road is the governing date in the adjustment thereof.

As regards definite location, the usual course is for the railroad company to file in advance of construction, a map showing the line of route of its road in connection with the lines of the public surveys, with certificates showing that such line has been adopted by the company as the definite loca-

tion of the line of its road, and the date of such adoption. 421

The filing in and acceptance of such a map by the Department is generally held to constitute definite location.

In the present case no map of defined location was filed in advance of construction.

On the 18th inst., however, the Hon. Secretary of the Interior referred to this office, for consideration, your letter of the 8th inst., transmitting a map purporting to show the line of said road as definitely fixed.

This map bears the affidavit of the Chief Engineer of the Company, sworn to Apr. 24th, 1883, to the effect that the survey and actual location of the line of route of said road from White Castle to Shreveport was made between Aug., 1875, and Dec., 1880, and from New Orleans to Westmego during the month of May, 1881. 422

It also bears your sworn certificate, dated May 7, 1883, to the effect that the line of route of said road was located by the Chief Engineer of the Company in conformity with a resolution of the Board of Directors adopted on the 12th day of Aug., 1875, as the definite location of the road from White Castle to Shreveport, and from New Orleans to Westmego, and that the dates of the actual location are correctly shown on the map. 423

You ask that the dates shown on said map be recognized as the dates on which the line of the road was definitely fixed.

In the case of *Van Wyck v. Knevals*, decided by the Supreme Court at its October Term, 1882, the line of the St. Joseph and Denver Railroad, (Act July 23, 1866; 14 Stats., 110,) was held to have been definitely fixed when, through the filing with and the acceptance of a map thereof by the Secretary of the Interior, it had ceased to be the subject of change at the will of the company. The Depart-

424 ment has generally held that a road is definitely located when the line is so fixed that it cannot thereafter be changed in any material particular without the consent of the granting power. (See Copp's L. O., vol. 1, p. 164).

That portion of the road between New Orleans and Westwego was expressly excluded from the President's acceptance, and, therefore, the date of the definite location of such portion is of no consequence to this office.

The portion between White Castle and Shreveport was surveyed and located between Aug., 1875 and Dec., 1880.

425 The assignment of the grant to the New Orleans Pacific Railway Company was executed Jan'y. 5, 1881, and the deed of such assignment was filed in this office Feby., 17, 1881.

It can hardly be claimed that the line of the New Orleans Pacific road was at any time between 1875 and 1880 so fixed that it could not have been changed without the consent of the granting power. The company had then no claim to the grant, nor standing before this Department, and could have changed its line at its pleasure.

I must, therefore, decline to recognize the dates shown on said map as the dates of the definite location of the road in question.

426 The first maps showing the location of the road which were filed in the Department were the maps of constructed road, and as actual construction is the best possible definite location, I am of the opinion that the filing of said maps should be held to be the definite location of the respective sections of road shown thereon.

This office will, therefore, in the adjustment of the grant treat the dates of the filing of said maps (Oct. 27, 1881, and Nov. 17, 1882), as the dates of the definite location of the road.

You will be allowed sixty days from the receipt of

this letter within which to appeal to the Secretary 427
of the Interior, should you so desire.

Very respectfully,

D HARRISON

Acting Commissioner

**Plaintiff's Exhibit 23.—Letter from
Comr. Genl. Land Office.**

October 15th '83

Register and Receiver,
Natchitoches, Louisiana.

428

Gentlemen:

By the Act of Congress approved March 3, 1871,
—22d Section,—(16 Stats., 573-579), there was
granted to the New Orleans Baton Rouge and
Vicksburg Railroad Company, its successors and
assigns, the same number of alternate sections of
public lands per mile in the State of Louisiana, as
were by said act granted in the State of California
to the Texas Pacific Railroad Company.

The lands granted by said act in the State of
California to the Texas Pacific Railroad Company
are every alternate section of public land, not min-
eral, designated by odd numbers, to the amount of 429
ten alternate sections per mile on each side of such
line as said company may adopt, where the same
shall not have been sold, reserved, or otherwise dis-
posed of, or to which a preemption or homestead
claim may not have attached at the time the line
of said road is definitely fixed; and in case any of
said lands shall have been sold, reserved, occupied,
or preempted, or otherwise disposed of, the com-
pany is authorized to select in lieu thereof other
lands in alternate sections, designated by odd num-
bers, and not more than ten miles beyond the lim-
its of the alternate sections first above named.

430 On Nov'r 11th, 1871, the said New Orleans, Baton Rouge and Vicksburg Railroad Company filed in the Department a map showing the line of general route of its road from Baton Rouge to Shreveport. By letter dated Nov'r. 29th, 1871, a diagram showing said line in your district, with the twenty mile (granted), and thirty mile, (indemnity), limits, was transmitted to your office with instructions to withdraw from further entry or sale all the odd numbered sections falling within the thirty mile limits, and to hold at the double minimum price the even numbered sections within the twenty mile limits.

431 By deed bearing date Jan'y. 5th, 1881, the New Orleans, Baton Rouge and Vicksburg Railroad Company conveyed to the New Orleans Pacific Railway Company all its right, title and interest in or to the lands granted to it by the Act of March 3d, 1871.

432 On the 19th March, 1883, the Hon. Secretary of the Interior transmitted to this office, for appropriate action, a copy of his letter of the 13th Mar., 1883, to the President, enclosing two reports of Mr. Thomas Hassard, Commissioner, on 328 miles of the New Orleans Pacific Railway, and recommending that said 328 miles of road be accepted, less and exclusive of 68 miles thereof, extending from New Orleans to White Castle, (to which 68 miles the New Orleans Pacific road has withdrawn its claim and right to receive lands), and that patents for such lands as may have been earned by the construction be issued to the New Orleans Pacific Railway Company, (exclusive of lands along said 68 miles), on their compliance with the law and regulations in such case made and provided; with the President's endorsement thereon approving the recommendations.

Accompanying said letter of Mar. 19th were two maps showing the line of route of the New Orleans

Pacific Railway as constructed from New Orleans 433
to Shreveport. One of said maps shows three sections, comprising 130 miles of road, located as follows: Sixty miles extending from a point on the Mississippi River, opposite New Orleans, to a point near the town of Donaldsonville; twenty miles extending from a point in Town. 2 N. Range 1 E. to a point in Town. 4 N. Range 2 W., and fifty miles extending from the junction with the Texas and Pacific Railway, in Shreveport, to a point in Town. 10 N., Range 12 W. This map was filed in the Department Oct. 27th, 1881, with Mr. Hassard's report.

The second map, which was filed in the Department Nov'r. 17th, 1882, covers such portions of said road as are located between the sections shown upon the first map. 434

The company having failed to file a distinctive map of definite location, this office on May 22d, 1883, decided to treat the maps of constructed road as the maps of definite location, and the dates of the filing of the same in the Department as the dates of definite location; which decision was accepted by the Company (through its President), on the day following.

I transmit, herewith, a diagram showing the twenty and thirty mile limits adjusted to the several sections of definitely located, (and constructed), line of road as above indicated, also the twenty and thirty mile limits of the withdrawal upon general route ordered Nov'r. 29th, 1871, so far as said limits fall within your district. 435

The twenty mile (granted,) limits of definite location are represented by lines shaded *yellow*, and the thirty mile (indemnity), limits by lines shaded *red*, while the twenty and thirty mile limits of the withdrawal of 1871 are shaded *violet* and *green*, respectively.

436 Except as hereinafter modified the withdrawal of 1871 will remain effective, and, in addition, you are directed to withdraw from sale or entry all the land in the odd numbered sections to the extent of the thirty mile limits of definite location not already withdrawn.

437 All the even numbered sections falling outside of the twenty mile limits of the former withdrawal which now fall within the twenty mile limits of definite location will be held subject only to pre-emption and homestead entry or to timber culture entry, if subject to such entry. When entered under the preëmption laws, or in cases of commuted homestead entries, payment must be made at the rate of \$2.50 per acre, unless in the former case settlement was made prior to the receipt by you of the order increasing the price of the land.

The status of the even numbered sections falling within the twenty mile limits of the withdrawal on general route, and also within the twenty mile limits of definite location will not be changed by this order.

438 The even numbered sections falling within the twenty mile limits of the general route which now fall between the twenty and thirty mile limits of definite location, will be reduced to the minimum price of \$1.25 per acre, unless increased to double minimum by the withdrawal for the Vicksburg, Shreveport and Texas Railroad Company, and held subject to entry only under the preëmption and homestead laws, or under the timber culture law. The status of the remaining even numbered sections between the twenty and thirty mile limits of definite location will not be changed.

The lands in the odd numbered sections within the thirty mile limits of the former withdrawal which now fall outside of the thirty mile limits of definite location will, unless within the limits of the withdrawal for the Vicksburg, Shreveport and

Texas Railroad Company, ordered May 31st, 1856, 439
continued and defined by letter and diagram May
12th, 1858, be restored to entry under the pre-
emption and homestead laws, or the timber culture
law, at the minimum price of \$1.25 per acre. The
status of the even numbered sections so situated
will not be affected by this order.

In order to carry the above mentioned order into
effect, you will cause to be published in the news-
paper having the largest circulation in your dis-
trict a notice that upon a day to be fixed by you,
and not less than thirty days from the date of the
notice, the lands to be restored will become subject
to entry as above. A copy of the paper containing 440
this notice should be promptly forwarded for the
information of this office. The Receiver, as dis-
bursing officer, will pay the cost of publication, and
should forward a copy of the notice, with proof of
publication as his voucher for the disbursement.

The lands within the twenty mile limits of the
former withdrawal which now fall north of and
beyond the terminal limit of definite location will
be released from the operation of the withdrawal
of 1871, but the odd sections so located being within
the limits of the withdrawal for the Vicksburg,
Shreveport and Texas Railroad, will not be re-
stored.

Such of the even sections so situated as fall be- 441
tween the six and fifteen mile limits of the with-
drawal for said Vicksburg, Shreveport and Texas
Railroad will be reduced to the minimum price and
held subject to entry as other even sections re-
duced in price by this order.

Upon the receipt by you of this order the New
Orleans Pacific Railway Company will be in a posi-
tion to select the lands enuring to it under its
grant. It will be required, however, to pay the
cost of selecting and surveying such lands, as pro-
vided in paragraph seven, Section 2238, Revised

442 Statutes, and in the Act of July 31, 1876, (19 Stats., 121).

Report promptly the date of the receipt by you of this order and accompanying diagram.

Very respectfully,

N. C. McFARLAND,
Commissioner.

**Plaintiff's Exhibit 24.—Letter from
Wheelock, and Brief of Dillon.**

443 *Opinion of JOHN F. DILLON & WAGER SWAYNE
that there is no existing power in Congress to
forfeit the Land Grant assigned to the New
Orleans Pacific Railway Company by the New
Orleans, Baton Rouge & Vicksburg R. R. Co.*

"E. B. WHELOCK, ESQ.,
President New Orleans Pacific Ry. Co.
New Orleans, La.

DEAR SIR,

444 We have yours stating that a bill has recently
been introduced in one branch of Congress pro-
posing to forfeit, among other land grants, that
made to the New Orleans, Baton Rouge, and Vicks-
burg Railroad Company on the 3rd day of March,
1871, by the 22nd section of the Texas and Pacific
Railway Charter. You inquire whether, under the
circumstances, it is our opinion that any power in
Congress to forfeit that grant now exists.

To answer the question requires that the circum-
stances of the case be considered. On the 3rd day
of March, 1871, Congress created the Texas and
Pacific Railroad Company, a corporation for the
purpose of building a railroad on or near the 32d
parallel from a point in the State of Texas to San
Diego on the Pacific Coast in California. The pur-
pose of Congress in chartering the Texas and Pa-

cific Company was to provide a southern trans- 445
 continental route to the Pacific on or near the 32d
 parallel. Pursuing the same policy that it had
 done in the case of the Union Pacific, it adopted a
state corporation of California (section 23) to con-
 nect the main line in California with the important
 city of San Francisco; and a *state* corporation of
 Louisiana, to wit, the New Orleans, Baton Rouge
 and Vicksburg Railroad Company, to connect the
 main line with the great city of New Orleans and
 the Mississippi River (section 22). The particular
 company which should form the vinculum was im-
 material to Congress; and therefore the grant was
 made to the company "and its successors and 446
 ASSIGNS." The leading and indeed the only purpose
 of Congress was to secure a connection with New
 Orleans and the Mississippi River and the particu-
 lar corporate organization of Louisiana was of no
 consequence to the general government.

The preliminary map of the route of the New
 Orleans, Baton Rouge and Vicksburg Railroad
 Company, commonly called the "Backbone Com-
 pany," was filed in the Department of Interior at
 Washington; and lands withdrawn as is usual in
 such cases.

The New Orleans Pacific Railway Company
 is a company chartered by the laws of Louisiana 447
 June 17th, 1875, confirmed by the special act of
 the legislature of Louisiana, February 19th, 1876.
 The termini of the road of the New Orleans Pa-
 cific Company were identical and the route sub-
 stantially coincident with that of the New Orleans,
 Baton Rouge and Vicksburg Company. The line
 of the New Orleans Pacific Company is constructed
 from New Orleans to Baton Rouge, thence by way
 of Alexandria to a connection with the Texas and
 Pacific Railroad at its eastern terminus. The Back-
 bone Company never constructed any road. The
 only road connecting the City of New Orleans with

448 the Texas and Pacific Railroad was constructed in and after the year 1881, by the New Orleans Pacific Railway Company. Prior to such construction, it received a deed dated the 5th day of January, 1881, from the Backbone Company conferring all of its right, title and interest in the lands granted to it by the act of Congress to aid in the construction of said road. This transfer was approved and confirmed by the stockholders of the Backbone Company and was accepted by the New Orleans Pacific Company. The transfers were duly filed in the Interior Department. On the faith of this transfer, the New Orleans Pacific Company
449 proceeded to construct and did construct, the road from New Orleans to Shreveport, the eastern terminus of the Texas and Pacific Railroad. The lands were used by the New Orleans Pacific Company to pay for the cost of construction. After the New Orleans Pacific Company had completed part of its road, it made application for lands to the Department of the Interior. Upon this application, on the 5th day of January, 1882, the Honorable S. J. Kirkwood, Secretary of Interior, submitted to the Attorney General of the United States, the questions arising upon this application. On the 13th day of June, 1882, the Attorney General of
450 the United States gave a written opinion to the Honorable H. M. Teller, then Secretary, upon the questions submitted by his predecessor, in which he held in substance that the grant to the Backbone Company was one *in presenti*; that the company might assign the lands granted to it; and that the New Orleans Pacific Railway Company was the lawful successor to and assignee of the Backbone Company, within the meaning of the act of March 3, 1871. Upon the faith of this opinion, the New Orleans Pacific Company continued the work of construction and finally completed the road. Commissioners have been appointed under section 18

of the act by the President of the United States 451
 to examine the road constructed by the New Orleans Pacific Company, who reported to the President that the road was completed from New Orleans to Shreveport in substantial compliance with law and the instructions of the Interior Department. This report was approved by the Secretary of the Interior and also by the President of the United States; and patents ordered to be issued.

Upon these facts, you inquire whether Congress can now forfeit the land grant. This question may be briefly considered in two aspects:—could Congress forfeit the grant if the road had been built by the Backbone Company, at the same time and precisely in the same manner as it was in fact built by the New Orleans Pacific Company? If it could not, can it forfeit the land grant because the road was built by the New Orleans Pacific Company instead of by the Backbone Company? To answer these questions, we must recur to the language making the grant, which will be found to be in material respects very different from the usual grants made by Congress. Congressional land grants have commonly been made upon a *condition subsequent*, expressed in these words, “*if the road is not completed within ten years (or within some other specified period) no further sales of the lands granted shall be made and the lands unsold shall revert to the United States.*” This language was considered in the leading case of *Schulenberg v. Harriman*, 21 Wall. 44, 63, to create a condition subsequent; and notwithstanding the failure to build the road within the specified time, the title to the lands granted remained in the state or company until “some legislative assertion of ownership of the property or breach of condition” was made by the United States. 452 453

as

In the grant now under consideration, (~~and~~ in some others), the language of Congress was varied.

- 454 It provided in section 17 that the Texas and Pacific Railroad Company should complete its line of road "within ten years from the passage of the act; and upon failure so to complete it *Congress may adopt such measures as it may deem necessary and proper to SECURE ITS SPEEDY COMPLETION*". In the 22nd section of the act making the grant to the Backbone Company, the terms and provisions were the same except that Congress provided that the Backbone Company should complete the whole of its road within *five* years from the passage of the act. It will thus be seen that the only power which Congress reserved was that if the road was not completed
- 455 within the specified time, "Congress may adopt such "measures as it may deem necessary and proper to "secure its speedy completion." Powers of forfeiture are strictly construed; and it may admit of doubt whether the power here reserved is broad enough under any circumstances to include \wedge the power of declaring an absolute and however, unconditional forfeiture of the grant. Assuming, \wedge if the Backbone Company had not completed its road within five years, that the reserved power of enough
- Congress is broad \wedge to have authorized the forfeiture of the grant and a re-grant of the lands to
- 456 the same or \wedge another company, yet if the road were completed before Congress thus acted, it is too clear for argument that the power of forfeiture would not, under such circumstances, exist. *On that question, there is no other side.* The only question that can possibly exist is, inasmuch as the road was built by the New Orleans Pacific Company instead of by the Backbone Company, whether Congress can treat the road as not having been built at all, and ~~could~~ proceed to forfeit the grant.¶ In our judg-

ment, it is plain that this cannot be done for these reasons: 457

First, the power to forfeit, if it exists at all, is not an absolute and unlimited power but one which can be exercised only for the purpose of securing the speedy completion of the road. The road which Congress desired to secure has already been built, and that by aid of this grant. If this grant were forfeited and the land re-granted to another company, it could only be for the purpose of

building a road precisely between the same termini to,

and parallel and in the immediate vicinity of, the road already built. Of course, Congress ~~can~~ not 458
would

forfeit the grant with a view of *re-granting* the lands for any such ~~purpose~~ purpose. Any forfeiture which might be declared by Congress unaccompanied by a re-grant of the lands to secure the speedy completion of the road would, of course, be contested, and in our judgment successfully contested, by the Backbone Company or its assigns.

Second, the grant is made in express terms to the Backbone Company, "its successors and assigns". The word "assigns" here used has no effect whatever unless it expresses a consent by Congress that the Backbone Company may assign its right to the grant to any other company, subject, of course, to the terms and conditions of the grant, that is to say, to the obligation to construct the road between the termini and on the route prescribed by Congress. 459

Third; the power to mortgage the *lands* is expressly given by the Texas and Pacific charter: first, in section 11, where the provision is "that the Texas and Pacific Railroad Company shall have power and authority to issue *two kinds of bonds*, secured by mortgage: first, construction bonds;

460 second, land grant bonds. The construction bonds to be secured by a mortgage on the franchises, road-bed and appurtenances; the land grant bonds to be secured by a mortgage on the lands granted in aid of the construction of the railroad—whether by Congress or by State or Territorial authority."

In the supplemental act of May 2nd, 1872, it is provided that the Texas and Pacific Railroad Company "shall have power and authority to issue construction *and land grant bonds*, authorized by the 11th section of said act of incorporation, for such amounts &c &c"

461 These express provisions make it indisputable that any of the grants of land made in the Texas and Pacific Charter may be mortgaged; and mortgaged separately from the franchises, right of way and road.¹ Indeed the only object of a land grant is to enable the company with the aid of the lands thus granted to raise means for constructing the road. All the land grant roads, we believe, without exception have executed mortgages on their roads in advance of construction. The Union Pacific, the Kansas Pacific, the Texas and Pacific, the Northern Pacific, and the Atlantic and Pacific Companies have done this. Other land grant roads have done the same; and such mortgages have been
462 foreclosed and the rights of the original mortgagors

under of

divested and transferred by sales ~~or~~ decrees ~~under~~ foreclosure; and new companies have been organized, which have built the roads, earned the lands and received the patents. An instance of this will be found in the reports of the Supreme Court of the United States in *Grinnell v. Railroad Company*, 103 U. S. 739. For other instances, see *Kennedy v. St. Paul and Pacific Railroad Company*, 2 Dillon 448; *Jerome v. McCarty*, 94 U. S. 734.

The charter of the Union Pacific Railway Company granted by Congress did not expressly au-

thorize it to make any mortgage of its land grant; 463
 but in *Platte v. The Union Pacific Railway Company*, 99 U. S. 48-56, the Supreme Court of the United States held that the company was authorized to mortgage its lands, there being no restriction or prohibition in the charter. Mr. Justice STRONG says on this point

"When they (Railroad Companies) are authorized to acquire and hold lands separate from their roads, the authority must include the ordinary incidents of ownership—the right to sell or to mortgage. *Especially is this so when, as in the present case, the lands have been granted to the company by the legislature that granted the charter, without any restriction of their use.*" 464

It is settled law, therefore, by the Supreme Court of the United States, that the Backbone Company would have had the right to mortgage this land specifically to raise the means of construction, which, includes, of course, the right of the mortgagee on default to make his right absolute by foreclosure.

A mortgage is an *assignment, sub modo* at first, and complete on foreclosure and sale.

The very idea of a mortgage involves the power to assign, to alienate, and it necessarily carries with it the right of the mortgagee or purchaser at the foreclosure sale, to perform the condition and save the grant. 465

What is the difference in legal effect between such a case and the one now here presented? In such a case the road is built and the condition performed by an assignee, and not by the original grantee. If the New Orleans Pacific Railway Company had bought these lands at a foreclosure sale, under a mortgage covering the land grant made by the New Orleans, Baton Rouge and Vicksburg Railroad Company, and then had done just what it has now done, viz., built the road, no one would or could question its right to the lands. What differ-

466 ence does it make that it took in the first instance an absolute, instead of a conditional transfer of the original grantee's rights?

The power to mortgage being *expressly* given, and aside from that being recognized as incidental to the ownership of the lands, it follows that such mortgage if made is a complete lien upon the lands. It follows also that if the condition is broken the mortgagee may make his title absolute and acquire the lands. Now unless such a security is a delusion and a snare, the mortgagee may perform the act necessary to perfect the title to the lands. The law on this subject is well settled, that any one
467 interested in a condition may perform it.

"It is a general rule, that any one may perform a condition who has an interest in it, or in the land whereto it is annexed * * * This rule is recognized by the elementary writers".

People of Vermont *vs.* Society for
Propagation of the Gospel, &c., 2
Paine, 545.

"Any one who is interested in a condition or the estate to which it is attached, may perform it, and when it has once been performed, it is thenceforth gone forever."

- 468 2 Washburn on Real Property, (2d.
Ed) p. 10.
2 Crabbe, Real Property, 815.
10 Mod. 419.
Cruise, tit. 13; Estates on Con. Ch. 2,
secs. 6, 20.
Bac. Abr., tit. Condition (P) 1.
Simonds *vs.* Simonds, 3 Met. (Mass.)
558.

This demonstrates that the land grant is not personal to the Backbone Company; but is assignable; and would be so held, if Congress had not used the words "assigns". The use of the words in the grant, "successors and *assigns*" is clearly a

grant to successors and assigns in the event that 469
such grantee comes properly into being, in which
event the clause will be considered to read as fol-
lows:

"For the purpose of aiding in the construction
of the railroad herein provided for, there is hereby
granted to the New Orleans Pacific Railway Com-
pany, *assignee of the New Orleans, Baton Rouge
and Vicksburg Railroad Company*, every alternate
section &c &c."

The act clearly shows that the construction of
the railroad by the assignee of the Backbone Com-
pany is within the express contemplation of the
act. Of course, such assignee must have the 470
requisite authority from the State of Louisiana
to construct it, and this the New Orleans Pacific
has. That the successor or assignee shall have the
granted aid in building the road is among the
express terms of the grant.

Our conclusion is that there is no power in Con-
gress to forfeit this land grant as against the New
Orleans Pacific Company; and that there would be
no such power under the circumstances aside from
the action of the Attorney General and of the In-
terior Department; *a fortiori* none after such
action.

We might state other arguments leading to the 471
same conclusion; but it is scarcely necessary. We
might enlarge upon the inequity of any such for-
feiture in view of the fact that the road built ac-
complishes the purposes for which the grant was
made, and is the only road in existence to-day, con-
necting the Texas and Pacific and its system of
roads with New Orleans and the Mississippi River.
But we forbear as this opinion is already longer
than we ~~had~~ intended to make it.

New York December 20th 1883

JOHN F. DILLON

WAGNER SWAYNE

Attorneys for New Orleans Pacific
Railway Company.

472 NEW ORLEANS PACIFIC RAILWAY CO.

PRESIDENT'S OFFICE.

NEW ORLEANS, LA., Dec. 26 1883

E. B. WHELOCK,
President.

To The Honorable Secretary of the Interior,
Washington, D. C.

SIR:

473 The New Orleans Pacific Ry. Co. having learned that a bill or bills have been introduced in Congress looking toward the forfeiture of the land grant made to the New Orleans Baton Rouge and Vicksburg Railroad Co. by the 22d section of the Charter of the Texas & Pacific Railroad Co. assigned to the New Orleans Pacific Ry. Co. and on the faith of which the road was built, the opinion of our counsel was asked as to the power of Congress, under the circumstances to assert a forfeiture.

474 That the Department and through it the authorities of the General Government may be advised of the views entertained by the Company upon this subject I have the honor to transmit the letter of John F. Dillon and Wager Swayne upon the subject, which I respectfully ask to be placed upon the files of the department.

Kindly acknowledge receipt of this letter and the enclosed opinion to me here. Care New Orleans Pacific Ry. Co.

I have the Honor to be

Very Respectfully
Your Obedient servant

E. B. WHELOCK
President

Plaintiff's Exhibit 25.—Letter from 475
Wheelock to Secy. Interior.

Department of Justice. Jul 3 1885

HON. L. Q. C. LAMAR,
 Secretary of the Interior.

SIR:

I respectfully beg to call your earnest attention to the following facts:—

FIRST: I am the President of the New Orleans Pacific Railway Company, a line of road running 476
 from New Orleans, via Baton Rouge and Alexandria and connecting at Shreveport with the Eastern terminus of the Texas Pacific Railroad system, and that said line of road was completed in November 1882.

SECOND: By the 22nd. Section of the Act incorporating the Texas Pacific Railroad, approved March 3rd. 1871, Congress granted to the "New Orleans, Baton Rouge and Vicksburg Railroad Company" (a corporation created by Act of the Louisiana Legislature in 1869, and known as the "*Backbone Railroad Company*") certain public lands in the State of Louisiana, to enable it to connect New Orleans with the Eastern terminus of the Texas Pacific; the language of the granting Act being as follows:— 477

"SEC. 22. That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect by the most eligible route, to be selected by said Company, with the said Texas Pacific Railroad Company at its Eastern terminus, and shall have the right of way through the public lands to the same extent hereby granted to the said Texas Pa-

478 "cific Railroad Company; and in aid of its construc-
 "tion from New Orleans to Baton Rouge, thence by
 "way of Alexandria in said State to connect with
 "said Texas Pacific Railroad Company at its East-
 "ern terminus, *there is hereby granted to said Com-*
 "pany, *its successors and assigns*, the same number
 "of alternate sections of public lands per mile in
 "the State of Louisiana as are by this Act granted
 "in the State of California to said Texas Pacific
 "Railroad Company; and said lands shall be with-
 "drawn from market, selected, and patents issued
 "therefor, and opened for settlement and preemp-
 "tion upon the same terms and in the same manner
 479 "and time as is provided for and required from said
 "Texas Pacific Railroad Company within said State
 "of California. PROVIDED, that said Company shall
 "complete the whole of said road within five years
 "from the passage of this Act."

THIRD. That said Backbone Railroad Company did not build said line of Railroad, or any part of it, within the five years.

FOURTH: The New Orleans Pacific Railway Company was chartered under the general laws of Louisiana in 1875, confirmed by Act of the Louisiana Legislature in 1876, to build a line of Railroad from
 480 New Orleans to connect with the Texas Pacific, and actually began and prosecuted the work to a small extent in 1876 and 1877.

FIFTH: Finding it impracticable to build said line of Railroad without strong financial aid, the New Orleans Pacific Railway Company attempted unsuccessfully to obtain from Congress a forfeiture of the lands granted by the Section 22nd. quoted above, to the Backbone, and a transfer of said grant to itself, inasmuch as the New Orleans Pacific was surveyed and its lines located between the same terminal and intermediate points and within the

same withdrawal limits and in great measure over 481
the identical lines and with the same objects in view
as the Backbone Company; but though favorable
reports were obtained from the proper Committees,
final action was not had, and so the scheme of for-
feiture and transfer of the grant failed.

SIXTH: In 1880, the New Orleans Pacific Rail-
way Company, advised that the title to the granted
lands (subject to the breached condition) was still
in the Backbone Company, bought from said Back-
bone Company its title, by Act filed and approved
in the Interior Department.

SEVENTH: With the aid of said lands, the New 482
Orleans Pacific Railway Company was constructed
from New Orleans, via Baton Rouge and Alexan-
dria to Shreveport, which, by the Act of 1875, was
fixed as the Eastern terminus of the Texas Pacific,
said road being wholly finished early in November
1882.

EIGHTH: Said New Orleans Pacific Railway was
then surveyed and accepted by the United States
Commissioners, appointed for that purpose as con-
structed in accordance with the intention of Con-
gress as expressed in the 22nd. Section of the Texas
Pacific Act of March 3rd. 1871.

483

NINTH: Application was made for the patents
to said lands, inasmuch as they had been pledged
to the American Railway Improvement Company
as part of the consideration for the construction
of said Railroad, but the question was referred to
the Attorney General, who finally decided that the
proper title was in the New Orleans Pacific Rail-
way Company as the assignee of the Backbone Com-
pany. Finally the matter was agitated in Congress
by the introduction of bills for the forfeiture of said
grant, which bills were defeated by a vote of the

- 484 House and adversely reported by the Senate Committee in a proposed substitute for the original bill of forfeiture, which substitute proposed to give patents for said lands to the New Orleans Pacific Railway Company upon certain conditions, which conditions had already been substantially complied with in advance by said Company.

TENTH: The lands granted in the meantime were selected, certified and the United States fees for said location and certification demanded, paid to and accepted by the United States.

- 485 ELEVENTH: Orders were issued by the President of the United States for the issue of the patents to the New Orleans Pacific Railway Company, which orders were but partially executed, as patents for only about 670,000 acres were issued, leaving patents for a large number of acres of lands still due, when on the 10th day of March 1885, an order was issued by the Secretary of the Interior, suspending the order for the issue of patents for said lands.

- 486 I have waited until now before pressing the just claims of my Company for the issue of the residue of our patents, knowing the multitude of cares and perplexities that were incident to the head of so important a Department of the Government in the hour of a change of Administration, but I beg that you will now give to this matter serious consideration. All the lands selected and certified have been placed on the tax roll against my Company in Louisiana. The American Railway Improvement Company, to which these lands are largely due (being a part of the consideration for construction) is pressing for settlement. The interest of the settlers in the lands is perfectly guarded and they will have their lands under my contract with Hon. E. W. Robertson and Hon. N. C. Blanchard at \$2. per acre, which is fifty cents below the Government

price, and they now look to me to quiet the title 487
to their homes and lands.

If in your judgment further argument be required, I will be glad to appear before you, or the Attorney General, if, in your wisdom, it be referred to him, at any time you may select, and I beg to say that it is of very great interest to my Company that the matter be determined as speedily as possible.

With great respect, I have the honor to be,

Your most obedient servant,

E. B. WHELOCK

President,

N. O. P. Railway Company. 488

Washington, D. C.

June 13th, 1885.

**Plaintiff's Exhibit 26.—Letter from
Ellis and others.**

WASHINGTON, D. C., April 18, 1887.

SIR:—

I have the honor to enclose herewith the resolution of the stockholders of the New Orleans Pacific Railway Company, drawn and passed in conformity with the 3rd section of the act of February 7, 1887, entitled "an act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, to confirm title to certain lands and for other purposes." 489

I ask that the same be filed in your office and an acknowledgment of such filing be transmitted to me for the archives of said Company.

On behalf the New Orleans Pacific Railway Company I respectfully ask that patents issue to said Company forthwith or as soon as practicable, for the lands embraced within their grant, that remain unpatented.

490 The Road was completed in November 1882, and examined and accepted early in 1883. In February 1885 the Secretary ordered patents to issue for the lands granted, and while in process of execution this order was suspended by you.

I now ask in view of the legislation of Congress that you rescind the order of suspension issued by you in March 1885 and restore in full force the order for said patents issued by your predecessor.

491 It would seem that this is manifestly just and proper since the act of 1887 appears to be, not a new or original grant, but a confirmation by Congress of the assignment of the grant from the original grantee to the New Orleans Pacific Company. This assignment was made January 5, 1881, and the condition upon which the grant vested, viz., the construction of the Road—was complied with in November 1882, and accepted by the Government early in 1883, at which time the patents were due and eligible. The Company, delayed by no fault of its own, should not lose its order or status in the regular course of issue, but should stand as though its patents had been due since the early part of the year 1883.

492 Respectfully asking your consideration of these views and your early action thereon, I have the honor to be,

With great respect, your obedient servant,

E. JNO. ELLIS

Attorney for the

N. O. P. R-way Co.

HON. L. Q. C. LAMAR,

Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
Washington.

3783-1887.

APRIL 22, 1887.

THE COMMISSIONER OF THE
GENERAL LAND OFFICE,

SIR:

On February 8, 1887, there was approved an "Act to declare a forfeiture of lands to the New Orleans, Baton Rouge and Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes."

In conformity with section three of the act, the New Orleans Pacific Railroad Company, assignee of the company mentioned above, by a majority of its stockholders, has accepted the provisions of the act, and filed with the Department copy of resolutions adopted the 14th instant, through Hon. E. John Ellis, attorney for the company, who now asks for patents yet due. 494

The act of February 8th, 1887, being virtually a suspension of my order of March 10, 1885, you will, in order to carry out the provisions of said act, and in conformity with sections four and five thereof, formulate the necessary rules and regulations, and submit the same for the Secretary's approval.

The letter of E. John Ellis, Esq., with enclosures named therein, are herewith transmitted. 495

Very respectfully,

H. S. MULDOON

Acting Secretary.

RESOLUTION OF STOCKHOLDERS MEETING.

WHEREAS, the Board of Directors of this Company, have duly adopted the following Resolution, to wit:

RESOLUTION.

WHEREAS the Congress of the United States has duly adopted an Act, approved February 8th, 1887,

496 entitled "An Act to declare a forfeiture of lands
 granted to the New Orleans Baton Rouge & Vicks-
 burg Railroad Company, to confirm title to certain
 lands, and for other purposes", and it is provided
 in the third section thereof as follows,— "That the
 relinquishment of the lands and the confirmation
 of the grant provided for in the second sections of
 this Act are made and shall take effect whenever
 the Secretary of the Interior is notified that said
 New Orleans Pacific Railroad Company through
 the action of a majority of its stockholders, has
 accepted the provisions of this act, and is satisfied
 that this Company has accepted and agreed to dis-
 497 charge all the duties and obligations imposed upon
 the New Orleans Baton Rouge & Vicksburg Rail-
 road Company by the act of March 3rd, eighteen
 hundred and seventy-one, entitled "An Act to in-
 corporate the Texas Pacific Railroad Company, and
 to aid in the construction of its road, and for other
 purposes."

Now therefore, BE IT RESOLVED, by the Board of
 Directors of the New Orleans Pacific Railway Com-
 pany that the provisions of the said act of Congress
 are hereby accepted; and that the Company do also
 accept and will discharge all the duties and obliga-
 498 tions imposed upon the New Orleans Baton Rouge
 & Vicksburg Railroad Company by the Act of
 March 3rd, 1871, entitled "An Act to incorporate
 the Texas Pacific Railroad Company, and to aid in
 the construction of its road, and for other pur-
 poses".

RESOLVED, that a meeting of stockholders of
 the Company be called for Thursday, the 14th of
 April, 1887, at 12 M., for the purpose of accepting
 the provisions of said act of Congress of February
 8th, 1887, and accepting and agreeing to discharge
 the said duties and obligations imposed upon the

said New Orleans Baton Rouge & Vicksburg Rail- 499
road Company, by said act of 1871.

THEREFORE,

BE IT RESOLVED, by this meeting, representing
sixty-seven thousand shares of stock out of the
sixty-seven thousand two hundred shares issued
and outstanding, that the above resolution be, and
the same hereby is, in all things ratified and con-
firmed; that this Company does hereby accept the
provisions of said Act of Congress of February 8th,
1887, and also accepts and will discharge all the
duties and obligations imposed upon the New
Orleans Baton Rouge & Vicksburg Railroad Com- 500
pany by said act of Congress of March 3rd, 1871.

RESOLVED, that the said Board of Directors are
hereby authorized and directed to adopt any and
all resolutions, and the President and Secretary of
this Company to execute any and all instruments,
under corporate seal or otherwise, necessary to
complete, consummate or evidence such acceptance
of said Act of February 8th, 1887, and to execute
any instruments required or needful, whereby this
Company agrees to discharge all duties and obliga-
tions imposed upon the New Orleans Baton Rouge
& Vicksburg Railroad Company by said act of 501
March 3rd, 1871, entitled "An Act to incorporate
the Texas Pacific Railroad Company, and to aid in
the construction of its road, and for other pur-
poses".

A true copy of the minutes

ROBT STRONG
Secy.

Attest

April 14th 1887

502 **Plaintiff's Exhibit 27.—Letter to Geo. J. Gould, Pres.**

DEPARTMENT OF THE INTERIOR
WASHINGTON

ADDRESS ONLY
THE SECRETARY OF THE INTERIOR

SEPTEMBER 23, 1911.

MR. GEORGE J. GOULD,
President of the
Texas and Pacific Railway Company,
New York, N. Y.

503

SIR:

By the Act of Congress approved June 19, 1878 (20 Stats., 169), the Office of Auditor of Railroad Accounts was established as a bureau of this Department, and railroad companies

whose roads are in whole or in part west, north or south of the Missouri River, and to which the United States have granted any loan or credit or subsidy in bonds or lands,

504 were required to make such reports to the Auditor as he might from time to time require. The act also requires such railroads

to make an annual report to the Secretary of the Interior on the first day of November on the condition of each of said railroad companies, their road, accounts and affairs, for the fiscal year ending June thirtieth, immediately preceding.

The Office of Auditor was subsequently abolished and that of Railroad Commissioner established, and

the duties performed by the Auditor devolved on the Commissioner of Railroads. 505

The Act of Congress approved March 3, 1903 (32 Stats., 1086, 1119), provides, among other things:

That the Office of Commissioner of Railroads is hereby continued until the thirtieth day of June, nineteen hundred and four, when the same shall terminate, and the duties of the Commissioner shall be transferred to the Secretary of the Interior, together with the records and files of the office.

An examination of the records of the Department shows that your company has made annual report required by section 13 of its charter (Act of March 3, 1871, 16 Stats., 573), but that you have not made annual report required by the Act of June 19, 1878, since June 30, 1903, and you are requested therefore to forward to the Secretary of the Interior at as early a date as practicable reports for the fiscal years ended June 30, 1904, 1905, 1906, 1907, 1908, 1909 and 1910, and on November 1 next, a report for the fiscal year ended June 30, 1911. Reports required by said act should be made for the same periods on the New Orleans, Baton Rouge & Vicksburg Railroad, and such other railroads or railways, if any, as have been purchased or are controlled by the Texas and Pacific Railway Company, and come within the purview of the Act of June 19, 1878, from the dates of their purchase or control. 506 507

Blank forms have been prescribed by the Department and thirty-two copies thereof have this day been forwarded you under separate cover for use in the premises, and it is desired that, so far as practicable, they be made in typewriting. They need not be made in duplicate to the Department, but extra copies have been forwarded you in case

508 you desire to retain copies of them in the files of your company.

By direction of the Secretary:

Very respectfully,

(Signed) CLEMENT S. UCKER
Chief Clerk.

Reply dated Sept 26 1911—received Sept 27 1911 and referred to C. C.

Reply dated April 12 1912—received April 18 1912 and referred to C. C.

509 **Plaintiff's Exhibit 28.—Letter from Satterlee, Secy.**

THE TEXAS AND PACIFIC RAILWAY COMPANY

165 Broadway

New York

C. E. SATTERLEE

Sec'y & Treas.

DECEMBER 26th, 1911.

MR. CLEMENT UCKER, Chief Clerk,
Department of the Interior,

510 Washington, D. C.

SIR:

Referring to your several letters addressed to the President of The Texas & Pacific Railway Company, Mr. George J. Gould, in respect to furnishing the Department of the Interior with certain reports under an Act of Congress approved June 19th, 1878, (20 Stats., 169) which letters have been referred to me, I respectively beg to state that The Texas & Pacific Railway Company, has regularly, each year since the year 1872, made reports to the Department of the Interior, under the requirements

of Section 13, of its Charter granted by the Congress of the United States, March 3rd, 1871. 511

Referring to the particular years you mention in your letter, these reports were sent addressed to the Department of the Interior, but in some instances through the Commissioner of Railroad Accounts, as follows:

Sent Sept. 28, 1903, to Hon. James Longstreet,
Comm'r. of Railroads.

Sent Oct. 26, 1904, to Hon. Jas. I. Parker, Division of Lands and Railroads, Department of the Interior.

Sent Sept. 25, 1905, to E. A. Hitchcock, Department of the Interior. 512

Sent Sept. 18, 1906, to E. A. Hitchcock, Department of the Interior.

Sent Oct. 8, 1907, to Honorable Secretary of the Interior.

Sent Nov. 9, 1908, to Honorable Secretary of the Interior.

Sent Nov. 5, 1909, to Honorable Secretary of the Interior.

Sent Oct. 25, 1910, to R. A. Ballinger, Secretary of the Interior.

Sent Nov. 9, 1911, to W. L. Fisher, Secretary of the Interior. 513

These reports were accepted and I find by looking back to the annual reports of the Interior Department they seem to have been embodied therein.

I have never received to my knowledge, either a notice or copy of an Act of Congress approved June 19th, 1878, altering or amending the requirements of Section 13 of our said Charter, but the reports as prepared and sent through me to the Department of the Interior, have been accepted.

Referring to your letter to Mr. Gould of September 23rd, 1911, in which you say reports required

514 by said Act should be made for the same periods on the New Orleans, Baton Rouge & Vicksburg Railroad would say, that the New Orleans, Baton Rouge & Vicksburg Railroad Company was absorbed by the New Orleans Pacific Railway Company prior to the year 1882, the year which The Texas & Pacific Railway Company absorbed the New Orleans Pacific and made it part of its main line. Said road has no independent existence whatever to my knowledge.

The blanks which were sent to our President's office and by him forwarded to our office in Texas, seem to have gone astray as we have no account of
515 them whatever.

I am,

Very respectfully,

C. E. SATTERLEE

Secy. & Treas.

**Plaintiff's Exhibit 29.—Statement of
Grenville Dodge and Wheelock.**

SWORN STATEMENT OF GRENVILLE M.
DODGE IN REGARD TO THE CONSTRUCTION OF THE NEW ORLANS PACIFIC
516 RAILWAY (SUBMITTED TO HOUSE PUBLIC LANDS COMMITTEE).

HOW THE ROAD WAS BUILT.

I, GRENVILLE M. DODGE, state that in the winter of 1879 or spring of 1880 Mr. E. B. Wheelock, president of the New Orleans Pacific Railway Company, came on his own motion, and without any suggestion from me, to see me and other gentlemen with whom I was associated in business relations to enlist us in the enterprise of building the road of the said company from New Orleans to Shreveport,

showing us the charter, constitution, and laws of Louisiana, and representing very strongly how earnestly the people of New Orleans and Louisiana wanted this road constructed, so as to give New Orleans a connection with the Texas & Pacific Company. I had repeated interviews with Mr. Wheelock on the subject, and in April and May, 1880, I caused an examination of the route and cost of the proposed road to be made by engineers and others. I was informed and knew of the existence of the Backbone land grant. 517

ASSIGNMENT OF LAND GRANT A SINE QUA NON.

The result of numerous interviews was that I told him, as representing myself and others, that we would not undertake the construction of this road unless it could get the benefit of the land grant which had been made to the Backbone Company, either by a transfer of the same by Congress or by the Backbone Company. He assured myself and associates that in one of these ways this could be effected, and to confirm his assurance he showed us a written statement, signed, as I recollect, by the Louisiana delegation, that they were in favor of, and would do everything in their power to secure this grant, to aid in the construction of the New Orleans Pacific Railroad, which statement had a very material, if not controlling, influence in inducing us to undertake and carry on this work. I here positively state that unless this land grant could have been assured to the New Orleans Pacific we would not have enlisted in the enterprise of building the road. As the route of this road was practically identical with the route of the Backbone Company, it is clear that as a business matter capital could not be enlisted in it as against another company having the advantages of a land grant. We said to Mr. Wheelock that the transfer of the land grant from the Backbone company to 518 519

- 520 the New Orleans Pacific Company would answer, provided the other terms could be satisfactorily agreed upon; and provided further, our counsel would advise us that an assignment by the Backbone Company would be effectual. Negotiations were carried on through the spring and perhaps early summer of 1880, which finally resulted in an undertaking by the representatives by the Backbone Company to transfer the land grant to the New Orleans Pacific, which agreement was afterward carried out by the resolutions of the Backbone company dated December 29, 1880, subsequently ratified by the stockholders of that company and by the deed of that company of date January 5, 1881.
- 521

THE CONSIDERATION FOR BUILDING.

- 522 The land grant constituted part of the consideration for the building of the New Orleans Pacific road, and the enterprise was undertaken by myself and others, organized into the American Railway Improvement Company, on the faith of getting the benefit of the land grant, and the enterprise was prosecuted on the faith and belief that the assignment was effectual, and with the repeated recognition thereof by the officers of the Government during the progress of the work, such as the letters of General James A. Williamson, Commissioner of the Land Office, of February 17, 1881, and February 21, 1881; by Secretary Kirkwood in 1881; by the appointment of a commissioner to examine the road; and the opinion of the Attorney-General of June 13, 1882. The road was completed in 1882, with the exception of a bridge across the Atchafalaya River, which is a very expensive structure, costing about \$400,000, which was completed about Christmas, 1883. On March 13, 1883, the Secretary of the Interior recommended the issue of patents to the New Orleans Pacific company for the

lands earned by it for the construction of the said road, and his recommendation was approved by the President; on the faith of which large sums of money have been expended in the construction of the said bridge; and on faith of which also, and of the instructions of the Commissioner of the General Land Office of October 15, 1883, large sums of money had been paid for the cost of selecting lands to which the company was entitled, amounting, as near as I can recollect, to about \$30,000. 523

THE COMPANY'S LIBERAL POLICY AND DEALINGS.

To avoid all doubtful questions, and display a spirit of fairness and liberality, I assented on behalf of my company to relinquish our right to the lands in respect of sixty-eight miles of road which, instead of building, the New Orleans Pacific Railway Company, purchased and acquired from another company, notwithstanding I was advised by counsel that the New Orleans Pacific Railway Company was just as much entitled to the land grant for these sixty-eight miles of road, purchased under lawful authority from another company, and thus made part of its line, as if the New Orleans Pacific Railway Company had originally built it itself. 524

In pursuance of this same spirit and policy the improvement company assented that the railroad company might accept the adjustment proposed by the Commissioner of the General Land Office in his letter of May 22, 1883, fixing the date of definite location as of October 27, 1881, and November 17, 1882, although the said line was definitely located long prior to those dates; and in pursuance of the same spirit and policy the said improvement company assented to the Robinson-Blanchard contract of January 4, 1882, whereby it was agreed that settlers and occupiers of the lands up to that date should have the right to purchase the same, not 525

526 exceeding one hundred and sixty acres each, at a price not exceeding \$2 per acre.

Under these circumstances to forfeit this land grant, even if the bare legal power to forfeit it exists, I hope I will be pardoned to say, since such is the opinion and sentiment of those who furnished the means whereby to build and equip this road and to effect and consummate the public object of Congress in making the grant, without which New Orleans and Louisiana would to-day remain without direct connection with the Texas and Pacific, is so monstrously unjust, that it is difficult to conceive it as even possible.

527

SMALL PROFITS IN CONSTRUCTION.

In building this road, on account of the extraordinary high waters for two years and the increased cost of bridging the Atchafalaya River and the large and expensive terminals in New Orleans, there has been no profit to the improvement company. The actual cash paid out for the construction of the road is more to-day than the value of the securities received for the construction thereof; and if this land grant is obtained with the quantity thus diminished, as above stated, it will afford, at most, to the builders of this road a very

528 moderate, almost insignificant, profit.

G. M. DODGE

Sworn to February 18, 1884.

W. W. COTTON,

Notary Public.

IN THE MATTER OF THE LAND GRANT TO THE NEW ORLEANS, BATON ROUGE AND VICKSBURG RAILROAD COMPANY.—STATEMENT OF E. B. WHELOCK, PRESIDENT NEW ORLEANS PACIFIC RAILWAY COMPANY, THE ASSIGNEE OF ABOVE LAND GRANT. 529

TO THE HONORABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES OF THE FORTY-EIGHTH CONGRESS :

GENTLEMEN :

As president of the New Orleans Pacific Railway Company, the assignee of the lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company by act of Congress of March 3, 1871, it is my purpose to lay before you a brief summary of the facts and incidents connected with the assignment and pertinent to the question now under consideration by your honorable body, to wit, the forfeiture of the said grant. 530

The New Orleans Pacific Railway Company was chartered under the general law of Louisiana on June 29, 1875, and work was begun during the ensuing autumn. On the 19th of February, 1876, the General Assembly of Louisiana passed an act confirming the notarial charter and granting its perpetual existence. The long-felt need of railway communications in my State, and the urgent necessity for them then existing, and plainly visible on every side in the decline in value of all the immovable property of every description, both in the country parishes and in the chief city of Louisiana (New Orleans), had aroused the people throughout the State to a sense of the imperative need of a line of railway which would connect them with the great and prosperous section west of the Mississippi River. No public enterprise ever undertaken was more in harmony with popular feeling and 531

532 popular sympathy than the proposed construction of the New Orleans Pacific Railway Company.

After the lapse of a little more than a year about \$750,000 in cash had been subscribed, and a portion of it had been expended. In the winter of 1877 the railway company made vigorous efforts in Washington to procure the forfeiture of the land grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company, with the view of obtaining the same for themselves. These efforts were continued until 1880 without success, and the New Orleans Pacific Railway Company found themselves at that period with their funds exhausted and a portion only of the road-bed constructed. Such was the embarrassed condition of the finances of the people of Louisiana that the company was left helpless and unable to prosecute the work. At this juncture, the parties who were constructing the Texas and Pacific Railroad entered into writings to extend that line and construct the New Orleans Pacific Railway to New Orleans, provided the land grant of the New Orleans, Baton Rouge and Vicksburg Railroad Company was secured to them. I at once took steps to secure the transfer of the land grant, and succeeded. Contracts for the construction of the road were then immediately signed, and it was rapidly pushed forward, and was completed in 1882. Upon its completion the Government of the United States accepted the road and issued orders for the issue of patents upon the land, and the local land officers officially notified that the New Orleans Pacific Railway Company could make their selections, and on the payment of fees the title thereto would be vested in the company, so that the lands have been fully earned and the title or right of the company thereto is perfect. Only the formal act of the issue of the patents remains to be done.

As an immediate consequence of the construction 535
of the road, the values of property in New Orleans
and in the country parishes on the line of the road
were largely enhanced, railroad enterprises were
stimulated and increased, thereby greatly enlarg-
ing the assessments of taxable property and offer-
ing increased facilities to agriculture and com-
merce.

On the accession of Hon. N. C. Blanchard to a
seat in the House of Representatives from the
fourth Louisiana district, in the year 1881, a doubt
appeared in his mind as to the possibility of the
railroad company not properly regarding the right 536
of the settlers and occupiers of the land embraced
in the grant, and jointly with Hon. E. W. Robert-
son, member of Congress from sixth Louisiana dis-
trict, he filed a letter with the honorable Secretary
of the Interior asking for delay in the issuance of
patents to the New Orleans Pacific Railway Com-
pany. On being apprised of this, I at once pro-
ceeded to Washington and entered into a written
agreement for the protection of the settlers and
occupiers; and thereupon, on the 4th of January,
1882, Messrs. Robertson and Blanchard addressed
a letter to the honorable Secretary of the Interior
withdrawing their objections. Throughout this in-
terval various protests and objections to the issu- 537
ance of the patents have been presented to the
honorable Secretary of the Interior. Some of these
attaining prominence through the agency of the
press, were afterward proved to have emanated
from blackmailing sources, not before, however,
leaving their impress in certain quarters where one
might have expected that good judgment and able
statesmanship would have resisted the cry of "any-
thing to beat a railroad corporation." Happily
such sentiments do not find a lodgment in the clear

- 538 intelligence and strong sense of justice which control the deliberations and conclusions of this honorable body.

The right to the lands claimed by the New Orleans Pacific Railway Company under the transfer of this grant has been acquiesced in by the Senate Committee on Railroads (Senate Report No. 711, Forty-seventh Congress, first session); by both the late and the present Commissioner of the General Land Office; by the Secretary of the Interior; by the Attorney-General; and finally by the President of the United States.

- 539 More than two years after the completion of the road a protest against the issuance of the patents to the New Orleans Pacific Railway Company was filed by Hon. E. T. Lewis, member of Congress from sixth Louisiana district, in which he stands alone of the delegation from his State. By reference to a map to be found in the General Land Office it will be seen that about one-twentieth of the lands included in this grant and belonging to the railway lines in his district, while nineteen-twentieths of the land is embraced in the district represented by Hon. N. C. Blanchard, member of Congress.

- 540 By reference to the Census Compendium of 1880 and the extra census bulletin (areas of the United States) it can be proved that unless more than 10 per cent. of the constituency represented by Hon. Mr. Lewis are settlers without title upon the lands in question, the number of people in his district who are interested in this matter does not exceed sixty, and these are amply protected by the agreement made between the railway company and Mr. Blanchard, and the predecessor of Mr. Lewis, Mr. Robertson.

Under the act granting these lands there could be

no valid settlement or pre-emption after the maps of location were filed. These were filed by the grantee company in 1871 and 1873, and the lands withdrawn from sale or pre-emption. At all events there could be no valid settlement or pre-emption after the New Orleans Pacific Railway Company actually built its road. Now the Robertson-Blanchard agreement agrees to protect all settlers down to the date of that agreement, January 4, 1882, and allows them to buy their lands at \$2 per acre, one-third cash on the issue of patents and balance in one and two years, at 6 per cent. interest. This is less than Government price for the alternate sections, and on easier terms. 541

If Congress should undertake to forfeit this grant this would end this agreement, and years of litigation would ensue, in which no one would know meantime who owned the lands. A greater misfortune to the settlers and curse and blight to this whole region, now rapidly developing, could not be inflicted than to pass an act of Congress (which would certainly prove abortive in the courts) undertaking to forfeit the grant. 542

An act of greater injustice to the men who furnished the money to build this road on the faith of this grant, and without which the road would not have been built to-day, was never proposed to a legislative body. 543

It can not be possible, in view of this plain statement of facts, that a sufficient number of Representatives in Congress can be found to sustain this attack upon the legal and equitable rights of the New Orleans Pacific Railway Company, and to demand a forfeiture, which in this instance is but another name for a violation of the obligation of a contract.

It is a form of repudiation which I will not

181

544 believe that any considerable portion of an American Congress will lend themselves to.

Respectfully submitted.

E. B. WHEELLOCK,
President New Orleans
Pacific Railway Company.

The above and foregoing pages on which appear the seal of the "United States, House of Representatives", are true and correct copy of the Record in this office.

SAML TRIMBLE
Clerk, U. S. House of Representatives

545

**Plaintiff's Exhibit 32.—Decree in case
of Granger et als.**

UNITED STATES CIRCUIT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA,
AT NEW ORLEANS.

546 JOHN T. GRANGER and GEORGE
S. CLAY, Trustees, and PETER
B. WYCOFF, suing on behalf
of himself and all other
holders of Land Grant Scrip
Certificates issued by the
New Orleans Pacific Railway
Company,

Complainants,

AGAINST

THE NEW ORLEANS PACIFIC
RAILWAY COMPANY,
Defendant.

No. 12,687.
In Equity.

This cause came on, at this term, and on this day,
to be heard on the Bill of Complaint Exhibits, and

documents and proceedings heretofore had, and 547
upon the order or decree duly entered herein March
15, 1899, taking the said bill pro-confesso.

IN CONSIDERATION WHEREOF, it is now ordered,
adjudged, and decreed:

I

That the said order or decree taking the said
bill pro-confesso be, and the same is, hereby in all
things confirmed.

II

That by an Act of Congress of the United States 548
approved March 3, 1871, entitled "An Act to incor-
porate the Texas Pacific Railroad Company and to
aid in the construction of its road and for other
purposes", the said railroad company was incor-
porated and invested with certain rights, powers,
and franchises, and a grant was made to said com-
pany, its successors and assigns, of every alternate
section of public lands in the United States, not
mineral, designated by odd numbers, to the amount
of 20 alternate sections per mile on each side of
said rail road line as such line may be adopted by
said company through the territories of the United
States, and 10 alternate sections of land per mile 549
on each side of said rail road in California, where
the same shall not have been sold, reserved, or
otherwise disposed of by the United States, and to
which a pre-emption or homestead claim may not
have attached at the time the line of said road is
definitely fixed. Said act further provided that in
case any of said lands shall have been sold, re-
served, occupied, or pre-empted, or otherwise dis-
posed of, other lands shall be selected in lieu
thereof by said company under the direction of the
Secretary of the Interior in alternate sections and
designated by odd numbers not more than 10 miles

550 beyond the limit of said alternate sections first above named and not including the reserved numbers.

That by the 22nd Section of said Act of Congress, March 3, 1871, it was provided that the New Orleans, Baton Rouge & Vicksburg Railroad Company, chartered by the state of Louisiana, should have the right to connect by the most eligible route, to be selected by said company, with the railroad of the said Texas Pacific Railroad Company at its Eastern terminus, and should have the right of way through the public lands to the same extent granted by said act to the said Texas Pacific Railroad Company; and, in aid of its construction from
551 New Orleans to Baton Rouge, thence by way of Alexandria in said state to connect with the Texas Pacific Railroad at its Eastern terminus, there was by said act granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile, in the state of Louisiana, as were by said act granted in the state of California, to said Texas Pacific Railroad Company, as above set forth.

That by an act of Congress of March 2, 1873, supplementary to said last named act, the name of the said Texas Pacific Railroad Company was changed
552 to that of the Texas & Pacific Railway Company, and the said Texas & Pacific Railway Company was authorized and required to construct, maintain, control, and operate a railroad between Marshall, Texas, and Shreveport, Louisiana, or control and operate any existing line of railroad between said points of the same gauge as its own road.

III

That the defendant in this cause, the New Orleans Pacific Railway Company, by its charter and by an act of the Legislature of the State of Louisiana of February 19, 1876, entitled "An act to confirm the

Notarial Charter of the New Orleans Pacific Railway Company with amendments thereto, &c", was authorized to construct a railroad from the city of New Orleans, through the state of Louisiana, to a connection with the said Texas & Pacific Railway at Shreveport. 553

That on or about the fifth day of January, 1881, the said New Orleans, Baton Rouge & Vicksburg Railroad Company executed to the defendant, the New Orleans Pacific Railway Company, in due form, a Deed of Conveyance, granting and conveying to the said last named railway company, defendant herein, all the right, title, and interest of the said New Orleans, Baton Rouge & Vicksburg Railroad Company, its successors and assigns, in and to said grant of public lands granted to said company by the said Act of Congress of the United States, approved March 3, 1871, which said conveyance was duly executed by said grantor company and received and accepted by the grantee company; and was subsequently duly ratified by the stockholders of the said grantor company. 554

That the department of the Interior of the United States Government was duly notified of said transfer to the New Orleans Pacific Railway Company, and on the 21st day of February, 1881, the Commissioner of the General Land Office recognized the said transfer to the New Orleans Pacific Railway Company to be complete, and thereupon the said New Orleans Pacific Railway Company proceeded with the location and construction of the said road as required by the said Act of Congress of the United States, dated March 3, 1871, and the Acts of Congress supplementary thereto and amendatory thereof. 555

That commissioners were duly appointed by the Secretary of the Interior to examine the road so constructed by the said New Orleans Pacific Railway Company who reported that the same had been

556 constructed in full compliance with the Acts of Congress in the behalf, which reports were laid before the Secretary of the Interior; and on or about March 13, 1883, that officer found and decided that said New Orleans Pacific Railway Company had the right to receive the lands granted under said 22nd Section of said Act of Congress, March 3, 1871, and the patents for such lands as had been earned by said New Orleans Pacific Railway Company should be issued to it, which finding and decision were laid before the President of the United States, who, on or about the 16th day of March, 1883, as authorized by and conformably to said Act of Congress, March 3, 1871, endorsed the same, "This recommendation approved—CHESTER A. ARTHUR".

557

That by reason of the said construction of the said railroad by the said New Orleans Pacific Railway Company, whereby it earned said lands, patents of the United States for about 981,675.71, acres of lands have under said orders of the Secretary of the Interior and of the President of the United States, conformably to said Acts of Congress, and the other legislation of Congress hereinafter set forth, been issued to the said New Orleans Pacific Railway Company:—

558

The numbers and dates of said patents and the number of acres of each being as follows, to wit:—

No. 1, March 3, 1885.....	149,272.80	acres
2, do	295,162.33	"
3, do	65,040.46	"
4, do	169,812.05	"
5, Aug. 8, 1889.....	35,693.97	"
6, do	41,519.30	"
7, Jan. 15, 1891.....	79,152.39	"
8, Dec. 28, 1892.....	70,807.36	"
9, Apl. 24, 1895.....	9,062.48	"
10, Sep. 28, 1895.....	23,828.00	"
11, do	15,970.41	"

12, Jan. 13, 1896.....	1,619.86 acres	559
13, do 23, 1896.....	6,061.00 "	
14, Mch. 13, 1896.....	4,861.97 "	
15, do 27, 1896.....	1,349.04 "	
16, Apl. 22, 1896.....	2,559.96 "	
17, May 13, 1896.....	2,724.40 "	
18, June 13, 1896.....	1,566.88 "	
19, do 15, 1896.....	3,169.00 "	
20, do 27, 1896.....	1,106.28 "	
21, July 11, 1896.....	80.18 "	
22, Dec. 11, 1896.....	202.60 "	
23, " 12, 1896.....	489.20 "	
24, " 12, 1896.....	80.91 "	
25, May 21, 1897.....	79.58 "	560
26, " 28, 1897.....	163.43 "	
27, June 5, 1897.....	239.87 "	

981,675.71 acres

That applications by said New Orleans Pacific Railway Company are now pending before the Department of the Interior of the United States for other lands embraced in said land grant which may yet be certified and patented to said railway company as a part thereof.

IV.

That the New Orleans, Baton Rouge & Vicksburg Railroad Company never at any time filed any map of definite location of the line of its road or any part thereof, and never constructed any part of its road; and that the maps filed as aforesaid by the New Orleans Pacific Railway Company on October 27, 1881, and November 17, 1882, were the first and only maps of definite location of the said road ever filed with the department of the Interior.

562

V.

563

564

That the Congress of the United States, by an act approved February 8, 1887, entitled "An act to declare a forfeiture of lands granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company, to confirm title to certain lands, and for other purposes", forfeited all title of the New Orleans, Baton Rouge & Vicksburg Railroad Company to a portion of said lands as in said Act described which had been granted to said company by the Act of Congress March 3, 1871, and relinquished, granted, conveyed, and confirmed to the said New Orleans Pacific Railway Company, as the assignee of the New Orleans, Baton Rouge & Vicksburg Railroad Company (with certain exceptions and regulations as in said act provided), the title of the United States and of the original grantee to all the lands granted by the 22nd Section of said Act of Congress of March 3, 1871, and also confirmed the said patents which had been issued, as aforesaid, by the United States to the said New Orleans Pacific Railway Company March 3, 1885, and the said Act of Congress of February 8, 1887, was duly accepted by the New Orleans Pacific Railway Company and the Secretary of the Interior duly notified of such acceptance and agreement, and the said Secretary declared himself satisfied with the same, as in said Act of February 8, 1887, was provided.

VI

That on or about April 17, 1883, the said New Orleans Pacific Railway Company made and executed to John F. Dillion and Henry M. Alexander, as trustees, its land grant and sinking fund mortgage of that date, on all the lands granted as aforesaid to the said New Orleans, Baton Rouge & Vicksburg Railroad Company by the said Act

of Congress approved March 3, 1871, estimated to 565
 contain from 1,500,000, to 2,000,000 acres of land,
 and also all the right, title, and interest which the
 said New Orleans Pacific Railway Company then
 had or might thereafter acquire or become entitled
 to by virtue of the said Act of Congress, except
 lands which should be included in the railroad of
 the said New Orleans Pacific Railway Company, or
 used for the construction or operation thereof, or
 for the tracks, yards, and depot grounds, not ex-
 ceeding 40 acres at any one station with buildings
 or erections thereon; that said mortgage was so
 made to secure an issue of bonds known as the land 566
 grant and sinking fund bonds, which bonds, princi-
 pal and interest, as provided in said mortgage, were
 payable only out of the said lands or proceeds of
 the sale thereof, the said bonds being dated June 1,
 1885, and payable to bearer on the 1st day of July
 1911, with interest thereon beginning July 1, 1885,
 at the rate of six per cent. per annum, maturing
 semi-annually on the first days of January and July.
 The issue of the said bonds was by the said mort-
 gage limited to an amount equal to \$2.50 per acre
 on the number of acres of land which should be pat-
 ented or certified by the United States to or for the
 said New Orleans Pacific Railway Company.

That it was also provided in said mortgage that 567
 the purchaser of any of the lands embraced in the
 said mortgage should be at liberty to pay for the
 same in the bonds secured thereby at par and ac-
 crued interest, and that when any tract or parcel
 of the said lands had been purchased and paid for
 as aforesaid or in cash and the proceeds of such
 payment received by the trustees, the land should
 be conveyed by said trustees and stand released
 from any lien on account of the said bonds or the
 said mortgage, and that the bonds thus received

568 by the said trustees in payment for lands should be cancelled.

That said mortgage also provides, that in case such purchase money shall not amount to the value of the bonds with their accrued interest so surrendered, then the land Commissioner of the said New Orleans Pacific Railway Company shall have the power to issue a certificate representing the amount in excess due said purchaser, such certificate to be receivable for land only and without interest.

569 That said mortgage further provides that the proceeds of all sales of lands when received in cash are to be applied by the trustees as follows: *First*, to the payment of the necessary expenses of the trust, and the procuring, surveying, appraising, advertising, selling and conveying of the lands as herein provided: *second*, to the payment of taxes; *third*, to the payment of interest upon said bonds; *fourth*, any residue shall be carried to and shall constitute a sinking fund.

570 That said mortgage contains provisions that if default be made in the payment, as therein provided, of interest on any of said bonds, and such default shall continue for certain lengths of time therein specified, the trustees may of their own motion, or, on request of holders of one fourth of said bonds, shall take possession of the said lands, and sell the same at public auction to discharge such arrears of interest, and that, in case of such default for three years, the principal of said bonds may be declared due, and the whole of said lands sold at public auction in payment of the principal and interest of the said bonds, after deducting costs, charges, and expenses of the trust, &c. Such proceedings, however, are cumulative and do not preclude a foreclosure in judicial tribunals.

Said mortgage also provides that, if, on the first day of May in any year during the continuance of

the said trust, the moneys received from sales of lands shall not be sufficient to pay the taxes and assessments on said lands due for the preceding year or years, and to pay the governmental charges and actual cash expenses of the trust, then the said trustees are authorized and empowered, in their discretion, to advertise for sale and sell at public auction, to the highest bidder, for cash, enough of said lands to raise the sum required to pay the said taxes and assessments and governmental charges and actual cash expenditures of the trust. And the said mortgage also provides that, if at any time the said trustees shall not have sufficient money in amount applicable to that purpose to pay taxes, assessments, and governmental charges upon the lands granted by the said mortgage, the said trustees may, in their discretion, sell and convey at private sale instead of public sale, at such price or prices as they may deem expedient, without regard to the appraised value thereof, so many of said lands as may be necessary to produce the sum required to pay such taxes, assessments or charges; and said mortgage dated April 17, 1883, annexed to the bill of complaint in this cause, is also referred to as an exhibit of this decree.

VII.

That on or about January 5, 1884, and before the bonds had been issued, certified, or negotiated under said mortgage of April 17, 1883, the said New Orleans Pacific Railway Company made, executed, and delivered to said John F. Dillon and Henry M. Alexander, trustees, its mortgage dated January 5, 1884, supplemental to said mortgage of April 17, 1883, reciting the completion of the road of the New Orleans Pacific Railway Company from New Orleans to Shreveport, its said examination and approval, the order of the President of the United States and the Secretary of the Interior

- 574 that patents be issued for the lands embraced in the said land grant, the time that might elapse before said patents could be issued, the fact that no bonds had been issued by the company, and the expediency of changing and modifying the terms of said original mortgage. The said supplemental mortgage provided for the issue of bonds by the New Orleans Pacific Railway Company at any time after the execution of the said supplemental mortgage, on resolution of its Board of Directors or Executive Committee to the full extent of the quantity of lands which it was estimated the said company will receive from the United States by
- 575 reason of the completion of the said railroad, at the rate of not exceeding \$2.50 per acre, in advance of the issue of patents or certificates by the United States to said Railway Company, and the trustees were authorized to certify and deliver bonds under these supplemental provisions at the rate of not exceeding \$2.50 per acre, upon the receipt by them of a certified copy of a resolution of the New Orleans Pacific Railway Company stating the number of bonds to a certification of which the company should at any time be entitled under the provisions of said supplemental indenture, and said trustees were authorized to stamp upon such bonds
- 576 as might be issued before the patenting of the lands the following:

"This bond is issued pursuant to an original mortgage referred to in the bond, dated the 17th day of April 1883, and a supplemental mortgage dated the 5th day of January, 1884, which supplemental mortgage recites that the New Orleans Pacific Railway Company has completed its road from New Orleans via Baton Rouge and Alexandria to a connection with the Texas Pacific Railway at Shreveport, and that the same has been accepted by the President of the United States, and thereupon modifies the provisions of the original

mortgage and of the within bond so as to authorize the said railway company to issue and the trustees to certify bonds as provided in the said mortgage and supplement, at the rate of not exceeding two dollars and a half an acre, for the number of acres of land which it is estimated the company will receive from the United States, in advance of the issue of patents or certificates by the United States." 577

That said original mortgage of April 17, 1883, was declared to be in full force and effect, except as in said supplemental mortgage modified, and that said original mortgage and said supplemental mortgage and the said bonds and the indorsements thereon were and are to be taken and read as one instrument. And a copy of said supplemental mortgage, dated January 5, 1884, and annexed to the Bill of Complaint in this cause as Exhibit B, is referred to as part of this decree. 578

That said mortgage dated April 17, 1883, and said supplemental mortgage dated January 5, 1884, constitute, as one single mortgage, the first and only lien on the said lands granted to the New Orleans Pacific Railway Company by the said Acts of Congress hereinbefore referred to, and not surrendered back to the United States, or sold and conveyed, or disposed of, as provided in said mortgage. 579

VIII.

That after the execution and delivery of the said mortgage and supplemental mortgage of the New Orleans Pacific Railway Company, said company issued, under the signature of its President, and under its corporate seal attested by its Secretary, certain certificates known as "New Orleans Pacific Railway Land Grant Scrip Certificates", in and by which certificates, it promised to deliver to the bearer bonds of said company to the number therein specified, known as its land grant and sinking fund

580 bonds, which are the bonds hereinbefore and hereinafter referred to as such land grant and sinking fund bonds; and a copy of said certificates (except as to blanks therein) which is attached as an exhibit to Bill of Complaint in this cause and marked "Exhibit C." so referred to as part of this decree. The said certificates were issued for an amount of bonds to be delivered upon conditions therein stated, aggregating in all Four Million, two hundred and fifty thousand dollars (\$4,250,000).

IX.

581 That said New Orleans Pacific Railway Company presented to said John F. Dillon and Henry Alexander, Trustees, a certified copy of the resolution of said company, stating the number of bonds to which the company was entitled under the provisions of the said mortgage and said supplemental mortgage, and thereupon said trustees, acting under the powers and on the conditions in said mortgage and supplemental mortgage contained, certified the land grant and sinking fund bonds of said company in the form contained in the said mortgage, being "Exhibit A" of the Bill of Complaint, to the principal amount, in the aggregate, of one million, seven hundred thousand dollars (\$1,700,000) and no more, 582 and delivered such bonds so certified to the said railway company, and the said railway company delivered said bonds so certified to the holders of said land grant scrip certificates, in proportion to the number of bonds due to the said holders according to the terms of said certificates, to wit, bonds to the amount of forty per cent of the total amount of bonds named in such certificates, first having stamped on such certificates and indorsement such delivery of said forty per cent of the amount called for thereby:

That said complainant, Peter B. Wyckoff is the

owner and holder of said land grant certificates to 583
the total amount of fifteen thousand (\$15,000) and
which bear such stamp showing that six thousand
dollars of said bonds had been delivered thereon.

X.

That under the requirements of the said Acts of
Congress and of law in that behalf, the said New
Orleans Pacific Railway Company and said John
F. Dillon and Henry M. Alexander, trustees, have
surrendered and released to the United States,
upon its demand all the acres of the lands embraced
in said patents of March 3, 1885, which were sit- 584
uated East of the Mississippi River, amounting to
5292.95 acres. That under and pursuant to said
act of February 8, 1887, and the decisions of the
commissioner of the General Land Office, said rail-
way company and said trustees have conveyed to
settlers and occupiers thereof, as in said Act of
Congress provided, 16,588.27 acres of land, or
thereabouts, embraced in said patents to the New
Orleans Pacific Railway Company.

XI.

That in pursuance of an agreement known as the
Blanchard-Robertson agreement of January 4,
1882, referred to in said Act of Congress of Feb- 585
ruary 8, 1887, and in said supplemental mortgage,
certain lands amounting to 4368.44 acres, or there-
abouts, embraced in said land grant have been con-
veyed to settlers and occupiers thereof, as in said
agreement, act, and mortgage provided. A copy of
said Blanchard-Robertson agreement annexed to
the Bill of Complaint herein as "Exhibit D" is re-
ferred to as part of this decree. That two certain
suits are pending in this honorable court by the
United States against the New Orleans Pacific Rail-
way Company and others, in which the complain-

586 ants made demand for the reconveyance of certain lands included in said patents, upon the ground that said lands had been excepted from said grant by the provisions of said Act of February 8, 1887, and awarded to sundry claimants by the Commissioner of the General Land Office; and the United States, complainant in the suits above referred to, also demand in the alternative the payment of the maximum value of said lands at the rate of Two Dollars and a half per acre, and said suits have not yet been determined; and many contests with alleged settlers are also pending in the land offices of the United States at Natchitoches, New Orleans and Washington, D. C., involving large expenses in costs, charges and counsel fees, for which 587 neither the trustees of said mortgages nor the New Orleans Pacific Railway Company nor the Receiver herein can provide funds except by sales of lands.

XII.

That said New Orleans Pacific Railway Company and said John F. Dillon and Henry M. Alexander, trustees, caused all of said lands so patented to said New Orleans Pacific Railway Company and forming part of said land grant to be carefully appraised at the fair actual selling value, as in said 588 mortgage provided, and said railway company and said trustees, under the powers and pursuant to the terms and conditions in said mortgages contained, have, up to the date of the filing of the Bill of Complaint herein, December 28, 1897, sold and conveyed lands covered by the said mortgages to the amount of 548,029.57 acres, or thereabouts, in exchange for bonds secured by the said mortgages taken at par and accrued interest, and that such bonds taken in payment have been received by the said John F. Dillon and Henry M. Alexander as such trustees to the amount in par value of One million, five hundred and seventy six thousand dol-

lars (\$1,576,000) principal of said bonds, and have 589
 been cancelled; that said railway company and said
 John F. Dillon and said Henry M. Alexander, as
 such trustees, have, pursuant, to the provisions of
 said mortgages, sold and conveyed lands covered
 by said mortgages to the amount of 179,649.97
 acres, or thereabouts, for cash, and for the purpose
 of paying taxes and assessments on said land and
 governmental charges thereon and the actual cash
 expenses of the trust, and that the moneys received
 therefor have been by the said trustees applied to
 the payment of taxes, assessments, governmental
 charges and said cash expenses of the trust.

That in sundry cases where the purchase money 590
 of said lands so sold had not amounted to the
 value of the bonds so surrendered, with their ac-
 crued interest, certificates, as authorized by said
 mortgages, have been issued representing the
 amount of any excess due said purchaser, such cer-
 tificates being receivable for land only and without
 interest, and the same now outstanding amount to
 \$1511.44, and a copy of said certificates annexed
 to the Bill of Complaint as "Exhibit E" is referred
 to as part of this decree.

XIII.

That said trustees have applied the money re- 591
 ceived by them from the sales of lands, as herein-
 before stated, as in said mortgages provided, to
 wit, *first*, the sum of One Hundred and ninety two
 thousand, one hundred and seventeen dollars and
 sixty seven cents (\$192,117.67) or thereabouts, to
 the payment of the necessary expenses of the trust
 and the procuring, surveying, appraising, adver-
 tising, selling, and conveying of the said lands as
 in said mortgage provided; *second*, the sum of
 Eighty thousand, six hundred and fifty seven dol-
 lars and sixteen cents (\$80,657.16) or thereabouts
 to the payment of taxes and governmental charges;

592 and after the application of said moneys and said purposes, there has remained no money for application to the payment of interest on said bonds or any residue for any sinking fund.

That said trustees have from time to time prior to Dec. 28, 1897, stated their accounts of the said trust and the same have been passed upon, audited, and approved by the said New Orleans Pacific Railway Company, pursuant to the terms of the said mortgages.

593 That the trust represented by the complaining trustees in this cause was, at the date of the filing of the Bill of Complaint herein, December 28, 1897, and still is, indebted to sundry persons for necessary expenses and charges of and services to said trust, which indebtedness should be paid under the terms of said mortgages from proceeds of said lands by preference over all claims except taxes and governmental charges, and that such indebtedness has been passed upon, audited, and approved by the said New Orleans Pacific Railway Company in the accounts of the said trustees rendered as aforesaid, and that there was at the time of the filing of said Bill and now is no money in the said trust with which to pay the said indebtedness. The said indebtedness, at the date of filing the Bill in this cause, was and still is as follows, being the same set forth in "Exhibit 'F'" of the Bill of Complaint hereby referred to, namely:—

594

Estate of E. B. Wheelock, New Orleans.	\$1373.33
Chas. N. Greene, Land Commissioner, New Orleans.....	9361.79
Wm. M. Rhodus, Book Keeper New Orleans	3460.00
Howe, Spencer & Cocke, Attorneys, New Orleans	4850.00
James A. O'Shee, Special Agent, Alexandria, La.....	950.00

D. A. McKnight, Attorney, Washington,	593
D. C.....	2600.00
John F. Dillon & H. M. Alexander, Trustees, New York.....	2296.33
Harry Hubbard, Attorney, New York...	500.00
William J. Harding, Commissioner of Deeds for Louisiana and Custodian of cancelled Bonds and Records....	805.08
George S. Clay, Special Secretary to Trustees	372.91
J. T. Granger and Geo. S. Clay, Trustees, Commissions on Sales of Lands, as provided in mortgage, New York....	111.10
	596
	\$26680.54
Also State and Paris taxes for 1897 approximately	6500.00
	597
	\$33180.54

XIV.

That of the lands which the United States has patented, as aforesaid, to the said New Orleans Pacific Railway Company, there remained unsold and not conveyed or disposed of by said Railway Company and said trustees at the time of the filing of the Bill of Complaint herein Two Hundred and nine thousand, seven hundred and thirty two and sixty-four one hundredths (209,732 64) acres, or thereabouts, a list and description of which are attached to the Bill of Complaint as "Exhibit G" and which list is hereby referred to as part of this decree, part of which lands lie in the Eastern District of Louisiana and part in the Western District of Louisiana, the value of said lands in each of said districts exceeding the sum of Two thousand dollars (\$2000.00), and the value of said lands in both districts exceeding the sum of fifty thousand dollars (\$50,000.00).

598

XV.

That prior to the filing of said Bill of Complaint by due proceedings, as stated in said Bill, said John F. Dillon and Henry M. Alexander, respectively, resigned their places as trustees, as aforesaid, and their resignations were duly accepted by the said New Orleans Pacific Railway Company, and the said John T. Granger and George S. Clay complainants herein were respectfully duly nominated and appointed trustees of said mortgages and became such with all powers and duties belonging to said trusteeship.

599

XVI.

That upon the filing of verified Bill of Complaint in this cause, and on said 28th day of December, 1897, on motion of counsel for the complainants, the defendant, the New Orleans Railway Company, appearing by counsel on due notice, and due deliberation being had, Charles M. Greene of New Orleans was appointed Receiver of all and singular the several sections of land, and each and every part thereof, granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company by said Act of Congress, approved March 3, 1871, and of all the estate, right, title, interest, claim and demand
600 whatsoever at law or in equity, of, in and to the same or any part or parcel thereof which the said New Orleans Pacific Railway Company had or has, holds, owns, or is entitled to, and which was mortgaged to John F. Dillon and Henry M. Alexander, trustees, under said mortgages of April 17, 1883, and January 5, 1884, and which the said railway company and the said trustees, or their said successors, John T. Granger and George S. Clay, held or hold, own or are entitled to, or thereafter might

acquire, hold, own or be or become entitled to, and 601
which at that time had not been disposed of and
conveyed by them, with the usual powers and pos-
session of a Receiver in such cases and the usual
injunction against any interference with the said
Receiver by the said defendant company or said
trustees or any other person. That by said order,
the said Receiver was fully authorized to sell at
public or private sale, at such prices as he might
deem best, a sufficient quantity of said lands to pay
and discharge all of the indebtedness of the trust
created by the said mortgages, as shown in "Ex-
hibit F" attached to the Bill of Complaint herein,
amounting altogether to the sum of Thirty three 602
thousand, one hundred and eighty dollars and fifty
four cents (\$33,180.54). And said Receiver was
also authorized from time to time to sell at public or
private sale, at such prices as he might deem
best, such quantities of said lands as might be nec-
essary to pay and discharge from time to time all
taxes, governmental charges, and current expenses
in caring for the said lands, including the expense
of such sales and was directed to report to the
court from time to time his doings in the premises,
and authorized from time to time to apply to the
court for such other and further order and direc-
tion as he might deem necessary and requisite to 603
the due administration of said trust, and as ap-
pears by the record in the case, he has made sale of
certain lands from time to time and has paid sun-
dry amounts for State and Parish taxes and for the
expenses of said trust. And the said order, as
aforesaid, with respect to the sale of lands and to
payment and discharge of the said indebtedness, as
shown in said "Exhibit F", and the payment in
discharge of all taxes, governmental charges, and
current expenses is hereby continued in force.

604

XVII.

And, it appearing by the record that the said Receiver, Charles M. Greene, has duly rendered his reports in this cause, month by month, from his appointment down to and including the month of March, 1899, and said reports have remained on file in court and no oppositions have been filed or exceptions made thereto, it is ordered that said reports down to and including the month of February, 1899, be, and the same are, hereby approved and confirmed.

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XVIII.

It is further ordered, adjudged and decreed that this cause be referred to William Grant, Esq., one of the standing masters of this Court as Special Master to take and report, with all convenient speed, the evidence and his findings and conclusions upon the following questions and matters, to wit:—

The amount still due for expenses of the said trust under said mortgages, as set forth in the 13th paragraph of this decree and said "Exhibit F" of the Bill of Complaint herein:

606

The costs, disbursements, and allowances and expenses of the trustees herein and of their solicitors and counsel.

The number and amount of bonds issued and outstanding, and the amount due thereon for principal and interest, under the mortgage of April 17, 1883, and the supplemental mortgage of January 5, 1884, referred to in said complaint; and also the amount of outstanding land grant scrip certificates mentioned in said complaint, and the number of bonds issued on such scrip certificates; and whether any bonds are yet due to be issued on said scrip certificates or on any of them; and whether, if bonds are found to be so due, such bonds shall be issued, and,

if so, whether they shall be entitled to participate 607
 in respect of either principal or interest, and to
 what extent, in the proceeds of any sale of said
 lands, or whether, without the issue of such bonds,
 the holders of said script certificates shall be de-
 creed to be entitled to participate in the proceeds
 of any sale of said lands, and to what extent; also
 what, if any, certificates receivable for land only
 have been issued in connection with sales of lands
 as in said complaint set forth; and whether such
 certificates are entitled to participate in the pro-
 ceeds of any sale of said lands, and, if so, to what
 extent; and what are the liens, rights and equities
 and priorities of the holders of said bonds, and of 608
 the holders of said land grant scrip certificates and
 of the holders of the said certificates receivable for
 land only and as to the priority and order of pay-
 ment of said bonds and certificates out of any sale
 of mortgaged lands and premises and property.

The said Special Master shall also take evidence
 and report his finding and conclusion as to what
 lands and other property now remain undisposed
 of and subject to the said trust, and as to whether
 a sale shall be made of the same, and as to any and
 all other issues made by the pleadings in this suit.

The said Special Master shall give at least fifteen
 days' notice of the time and place of the taking of 609
 evidence under this order, such notice to be given
 by at least one publication in some daily newspaper
 published in the city of New York in the State of
 New York and in one daily newspaper published in
 the city of New Orleans in the State of Louisiana,
 such notice to be substantially as follows:

LAND GRANT OF NEW ORLEANS PACIFIC RAILWAY COMPANY.

FORECLOSURE SUIT.

Notice is hereby given that the Special Master
 appointed under an order of the Circuit Court of

610 the United States, for the Eastern District of Louisiana, dated April 28, 1899, in a suit wherein John T. Granger and others are plaintiffs and the New Orleans Pacific Railway Company is defendant, will, on the day of , at o'clock, at in the city of New Orleans, Louisiana, take evidence and grant a hearing under said order for the purpose of winding up said trust, and all parties owning bonds or scrip certificates, or otherwise having any claims against the said trust, are hereby notified to present the same before said master at said time and place.

611

Special Master.

Said Special Master may adjourn the hearing from time to time, and may in his discretion adjourn the same to some place in the City of New York, in the State of New York, if in his opinion it shall be necessary to take evidence there.

It is further ordered, adjudged and decreed that the Bill herein and this cause, be retained for such other and further findings of fact and law, and for such orders and interlocutory decrees, and for such final decree as may be just and equitable.

612

In open Court April 18th, 1899.

(Signed) DON A. PARDEE,
Circuit Judge.

UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

Eastern District of Louisiana.

CLERK'S OFFICE:—

I, HENRY J. CARTER, Clerk of the United States District Court for the Eastern District of Louisiana, DO HEREBY CERTIFY the foregoing 17 pages to be a true copy of a judgment and decree filed and of

record in the case of John T. Granger and George 613
S. Clay, Trustees, and Peter B. Wycoff, suing on behalf of himself and all other holders of land grant scrip certificates issued by the New Orleans Pacific Railway Company, Complainants, against The New Orleans Pacific Railway Company, defendant, No. 12,687 of the docket of the late United States Circuit Court, Eastern District of Louisiana.

WITNESS my hand and the seal of the said Court, at the City of New Orleans, Louisiana, this 12th., day of February A. D. 1915.

H. J. CARTER

[SEAL.]

Clerk.

[10¢ U. S. Revenue
Stamp Attached.]

614

I, RUFUS E. FOSTER, Judge of the said Court, do hereby certify that the foregoing attestation by Henry J. Carter, Clerk of said Court, is in due form.

WITNESS MY HAND, this 12th., day of February, 1915.

RUFUS E. FOSTER

[SEAL.]

Judge.

[10¢ U. S. Revenue
Stamp Attached.]

615

Complainant read in evidence, the decision of the Commissioner of the Land Office in Washington, D. C., as found in Vol. 8, pages 25, 26 and 27, Land Office decisions, rendered in 1889, which holds, that the New Orleans Pacific Railway Co. by accepting the provisions of the Act of Congress Feby 8th, 1887, assumed the payment of the obligations of the New Orleans, Baton Rouge and Vicksburg R. R. Co.

[COMPLAINANT RESTS.]

616 **Evidence Introduced by Defendant.**

In support of subdivision A of the Answer of Defendant, Texas and Pacific Ry. Co., Defendant introduced in evidence the Charter of the New Orleans, Baton Rouge and Vicksburg Ry. Co. as embraced in two Acts of the Legislature of Louisiana. One, approved Dec. 30th, 1869, found in the Acts of 1870, page 7, Act 43. The second is the Act approved December 11th, 1872, and appears as Act No. 100, of the Acts of 1873, page 29.

617 Defendant thinks these are public Acts, and it is stipulated may be read from the published Acts—under sub-division or paragraph B of the first defense in Defendant's Answer, Defendant refers to the (4) four Acts of Congress granting a Charter to the Texas Pacific, and the Texas and Pacific Railway Co. and amendments, which being public Acts of Congress the Court takes judicial notice of same—as follows—

Act of Congress, approved Mch. 3rd, 1871. Chapter 172; 16 Statutes at Large, page 573.

Act of Congress, approved May 2nd, 1872. Chapter 132; 17 Statutes at Large, page 59.

618 Act of Congress, approved May 3rd, 1873. Chapter 257; 17 Statutes at Large, page 598.

Act of Congress, approved June 22nd, 1874. Chapter 406; 18 Statutes at Large, page 197.

Under Sub-divisions C of Answer, Defendant introduces the Opinion of Attorney Gen'l Brewster, rendered to the Secretary of the Interior June 13th, 1882.

Mr. Milliken: Complainants rest.

Mr. Nicodemus: I do not suppose your Honor is in a position to pass on a motion to dismiss, but we make the motion to preserve our rights.

The Court: I will hear the case first.

Defendants' Exhibit A.

619

DEPARTMENT OF JUSTICE,

Washington, D. C., June 13, 1882.

SIR: By a letter dated the 5th of January last, your predecessors submitted to me a number of questions arising upon an application of the New Orleans Pacific Railway Company for certain lands claimed under the land grant made to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the act of Congress of March 3, 1871, chapter 122.

The land grant mentioned is contained in the twenty-second section of that act, which provides:

"That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have the right to connect, by the most eligible route to be selected by said company, with the said Texas Pacific Railroad at its eastern terminus, and shall have the right of way through the public lands to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and pre-emption, upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company, within said State of California; *Provided,*

620

621

- 622 That said company shall complete the whole of said road within five years from the passage of this act."

The eastern terminus of the Texas Pacific Railroad, as fixed by the same act, was a point at or near Marshall, Tex.

- 623 The New Orleans, Baton Rouge and Vicksburg Railroad Company was incorporated by an act of the legislature of Louisiana passed December 30, 1869, which authorized it to construct and operate a railroad "from any point on the line of the New Orleans, Jackson and Great Northern Railroad, within the parish of Livingston, running from thence to any point on the boundary line dividing the States of Louisiana and Mississippi," the route here indicated lying east of the Mississippi River. It was also authorized to construct and operate a branch railroad from its main line (above described) to the City of Baton Rouge; and for the purpose of connecting its railroad with the railroads of other companies, &c., it was furthermore authorized "to construct, maintain, and use, by running thereon its engines and cars, such branch railroads and tracks as it may find necessary and expedient to own and use"; and such branch railroads were, for all the purposes of the act, to be deemed and taken to constitute a part of the main line of its railroad within the State of Louisiana.
- 624

On November 11, 1871, that company filed in the General Land Office a map designating the general route of a road projected thereby from Shreveport, by way of Alexandria, to Baton Rouge, and thereupon a withdrawal of the public lands along the same were ordered, which became effective in December following.

Subsequently, by an act of legislature of Louisiana passed December 11, 1872, the same company was given "full power and authority to commence the construction of their road in the city of New

Orleans or Shreveport, or at any intermediate point on their line of road, as may best suit the convenience of said company and facilitate the speedy construction of a continuous line from the city of New Orleans to the city of Shreveport, or perfect railroad communication with the Texas Pacific Railroad, or any other railroad in Northwestern Louisiana, at or near the Louisiana State line; *Provided, however,* That the said company shall construct the line of its road between the city of New Orleans and the city of Baton Rouge on the east side of the Mississippi River, to the corporate limits of the said city of Baton Rouge, or adjacent thereto." 625

In the mean time, by the act of Congress of May 2, 1872, chapter 132, the Texas and Pacific Railway Company (formerly styled the Texas Pacific Railroad Company) was "authorized, and required to construct, maintain, control and operate a road between Marshall, Texas, and Shreveport, Louisiana, or control and operate any existing road between said points, or the same gauge as the Texas and Pacific Railroad." The same act further provided that "all roads terminating at Shreveport shall have the right to make the same running connections, and shall be entitled to the same privileges, for the transaction of business in connection with the said Texas and Pacific Railway, as are granted to roads intersecting therewith." 626

On February 13, 1873, a second map was filed in the General Land Office by the New Orleans, Baton Rouge and Vicksburg Railroad Company, designating the general route of a road projected thereby from New Orleans to Baton Rouge, and a withdrawal of the public lands along the same was ordered, which took effect in April, 1873. The route between those places, those designated, lies on the east side of the Mississippi River. That company has not constructed any part of its road, either 627

628 on the route between New Orleans and Baton Rouge or on the route between the latter place and Shreveport; nor, indeed, has there been a *definite location* of its road anywhere between the points mentioned. Nothing beyond the designation of the general route thereof appears.

Pursuant to a resolution of its board of directors, adopted December 29, 1880, all the right, title, and interest of that company in and to the aforesaid grant of public lands made by the act of March 3, 1871, were deeded by it to the New Orleans Pacific Railway Company. This action of the board of directors and officers of the former company was
629 afterwards approved and ratified by the stockholders thereof at a meeting held in December, 1881.

The New Orleans Pacific Railway Company was originally incorporated under the general laws of the State of Louisiana in June, 1875. Its charter was subsequently amended by acts of the Louisiana legislature passed February 19, 1876, and February 5, 1878. It is thereby authorized to construct a railroad "beginning at a point on the Mississippi River at New Orleans or between New Orleans and the parish of Iberville, on the right bank of the Mississippi, and Baton Rouge, on the left bank, &c., or from any point within the limits of this State,
630 and running thence toward and to the city of Shreveport," which is made its northwestern terminus.

The route of this company as projected is understood to extend from New Orleans to Baton Rouge, and thence, by way of Alexandria, to Shreveport. Between New Orleans and Baton Rouge it lies on the west side of the Mississippi River; while the designated route of the New Orleans, Baton Rouge and Vicksburg Railroad Company, between the same points, lies on the east side of that river. Between Baton Rouge and Shreveport its general course and direction corresponds, in the main, with

the route designated by the last-named company. 631
It is throughout its entire length from New Orleans to Shreveport within the limits of the before mentioned withdrawals of public lands.

In October, 1881, the president of the New Orleans Pacific Railway Company made affidavit that three sections of its road were then completed and ready for examination by the Government; whereupon a commissioner was appointed to examine the same, the result of whose examination appears in a report made by him to the Secretary of the Interior, under date of the 26th of that month. One of the sections embraces 68 miles of road, beginning on the west bank of the Mississippi River, opposite New Orleans, and ending near the town of Donaldsonville; another embraces 20 miles of road near Alexandria; and the third embraces 50 miles of road terminating at Shreveport. For each of these sections lands are claimed by that company under the aforesaid land grant, as assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company. 632

No map of definite location of any portion of its road has been filed, other than those of constructed portions.

It appears that in February, 1881, the New Orleans Pacific Railway Company purchased from Morgan's Louisiana and Texas Railroad and Steamship Company the road constructed on the west bank of the Mississippi River by the New Orleans, Mobile and Texas Railroad Company, from West-mego to White Castle, a distance of 68 miles, and that the same has become a part of the main line of the road of the New Orleans Pacific Railway Company. 632

The following are the questions submitted:

"1. Was the grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company a grant *in proesenti*?

"2. Had the New Orleans, Baton Rouge and

634 Vicksburg Railroad Company, at the date of its alleged transfer of lands to the New Orleans Pacific Railway Company, such an interest in the lands, under said act, as was assignable?

"3. Is the New Orleans Pacific Railway Company such a successor to or assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company as is contemplated by said act?

"4. Should it appear that the 68 miles of the New Orleans, Mobile and Texas Railroad was constructed *prior* to the act of March 3, 1871, granting lands to *aid in the construction* of the New Orleans, Baton Rouge and Vicksburg Railroad, can the New
635 Orleans Pacific Company (its assignee) claim any benefit from the grant? Or, in case of such prior construction, and the non-construction of any portion of the New Orleans, Baton Rouge and Vicksburg Road, has the purpose for which the grant was made failed and the grant consequently lapsed?

"5. If the New Orleans, Mobile and Texas Road was constructed subsequently to the date of said act, is so much of its road as is now owned by the New Orleans Pacific Company such a road as is contemplated for acceptance by the President within the meaning of said act, and may patents issue to the latter for lands opposite to and coterminous with such constructed portion of road?"
636

These questions are accompanied by a request for an opinion upon such other questions of law as may suggest themselves touching the transfer of said land grant, to which reference is above made.

Of the above-stated questions the first three may be considered together, in connection with the following inquiry, which presents itself at the outset, whether the *assent of Congress* to the transfer made by the New Orleans, Baton Rouge and Vicksburg Railroad Company of all its interest in said land grant to the New Orleans Pacific Railway Company is necessary (by reason of anything in the provi-

sions of the grant itself) to entitle the latter com- 637
pany to the benefit of said grant in aid of the con-
struction of the road projected by it.

The act of March 3, 1871, passed to the New Orleans, Baton Rouge and Vicksburg Railroad a *present interest* in a certain number of alternate sections of public lands per mile within the limits there prescribed. Its language is "there is hereby granted to said company" the number of alternate sections mentioned; words which import a grant *in presenti*, and not one *in futuro*, or the promise of a grant. (97 U. S. Rep., 496.) But the grant thus made is in the nature of a float. It is of sections to be afterward located, their location depending 638
upon the establishment of the line of the road. Until this is definitely fixed the grant does not attach to any specific tracts of land. Upon the line of the road being definitely located the grant then first acquires precision, and the company becomes invested with an inchoate title to the particular lands covered thereby, which can ripen into a perfect title only as the construction of each section of 20 miles of road is completed and approved, when the right to patents for the lands opposite to and coterminous with such constructed section accrues.

The *proviso* in the grant that the company shall complete the whole of its road within five years 639
from the date of the act is a condition subsequent, the failure to perform which does not *ipso facto* to work a forfeiture of the grant, but only gives rise to a right in the Government to enforce a forfeiture thereof. Yet in order to enforce a forfeiture such right must be asserted by a judicial proceeding, authorized by law, or by some legislative action amounting to a resumption of the grant. (Schulenberg *vs.* Harriman, 21 Wall., 44.) Hence, until advantage is taken of the non-performance of the condition, under legislative authority, the interest

640 of the grantee in the grant remains unimpaired thereby.

Such being the nature and effect of the grant and its accompanying condition, and no action having been taken either by legislation or judicial proceedings to enforce a forfeiture thereof, it follows that at the period of said transfer by the New Orleans, Baton Rouge and Vicksburg Railroad Company this company was invested with a present interest in the number of alternate sections of public lands per mile granted by the act of 1871, notwithstanding it was already in default in the performance of the condition referred to, and that it
 641 still retained a right to proceed with the construction of the road in aid of which the grant was made until advantage should be taken of the default. But as it had not then definitely fixed the line of its road, although a map designating the general route thereof was duly filed, that interest did not attach to any specific tracts of land, but remained afloat, as it were, needing a definite location of the road before it could become thus attached. Was the interest here described assignable to another company, so as to entitle the latter to the benefit of the grant in aid of the construction of *its* road between the places named therein, without the assent
 642 of Congress?

Doubt has perhaps arisen on this point in view of the fact that in one or two instances it has been thought expedient to obtain legislation by Congress confirming or authorizing a similar assignment (see section 2 of the act of March 3, 1865, chapter 88, and section 1 of the act of March 3, 1869, chapter 127), and also in view of the adverse ruling of this Department in the case of the Oregon Central Railroad Company. (13 Opin., 382.) However, a similar assignment made in 1866 by the Hannibal and Saint Joseph Railroad Company to the Pike's Peak Railroad Company, afterward known as the

Central Branch Company, was held to be valid by Attorney-General Stanbery in an opinion given to the Secretary of the Treasury under date of July 25, 1866. 643

In the latter case the Hannibal and Saint Joseph Company, which was incorporated by the State of Missouri, with authority to construct a railroad between Hannibal and Saint Joseph, within that State, was, by the Pacific Railroad act of July 1, 1862 (section 13), authorized to "extend its road from Saint Joseph, via Atchison, to connect and unite with the road through Kansas, * * * and may for this purpose use any railroad charter which has been or may be granted by the legislature of Kansas", &c., and by the fifteenth section of the same act it was provided that "wherever the word company is used in this act it shall be construed to embrace the words their associates, successors, and assigns, the same as if the words has been properly added thereto." Subsequently, in 1863, an assignment was made by that company of all its rights under said act (which included an interest in both a land and a bond subsidy) to the Atchison and Pike's Peak Railroad Company, a company previously organized under a charter granted by the legislature of Kansas. The latter company having constructed a section of 20 miles of the proposed road west from Atchison claimed the benefit of the grant made to the Hannibal and Saint Joseph Company, as its assignee, and this claim was recognized and allowed, in accordance with the opinion of the Attorney-General. It will be observed, however, that the Hannibal and Saint Joseph Company was authorized to "use any railroad charter which has been or may be granted by the legislature of Kansas," and this, together with the provision in the fifteenth section quoted above, may have been regarded as sufficient to sustain the assignment. 644 645

646 In the case of the Oregon Central Railroad Company, mentioned above, a grant of a right of way through the public lands, and also of alternate sections thereof, was made to that company, "and to their successors and assigns," by the act of May 4, 1870, chapter 69, for the purpose of aiding in the construction of a railroad and telegraph line between certain places in Oregon. In August following an instrument was executed by the company assigning all its interest in the grant to the Willamette Valley Railroad Company, and thereupon the question arose whether the grant was susceptible of being thus transferred. The Attorney-General

647 (Mr. Akerman), to whom the question was submitted, after reviewing the various provisions of the act, some of which (see section 5) imposed certain duties and required certain important acts to be performed by the company, decided in the negative, holding that, upon consideration of those provisions, the Oregon Central Company was alone within the contemplation of Congress in respect of the donation made and duties imposed by that act. The words "their successors and assigns," as used in the act, were regarded as words of limitation merely.

648 But the grounds upon which that decision appears to have been based are not found to exist in the case now under consideration. Here a grant of a certain number of alternate sections of public lands per mile is made to the New Orleans, Baton Rouge and Vicksburg Railroad Company, its successors and assigns, in and of the construction of a road from New Orleans, by the route indicated, to connect with the eastern terminus of the Texas and Pacific Railroad, which lands are required to be "withdrawn from the market, selected, and patents issued therefor, and opened for settlement and pre-emption upon the same terms and in the same manner and time as is provided for and

required from said Texas Pacific Railroad Com- 649
 pany." The grant is coupled with no special duties
 or trusts, for the performance of which there is
 reason to believe the particular company named
 therein was more acceptable to Congress than any
 other. Its purpose is to secure the construction of
 a railroad between the points designated, and
 whether this purpose be fulfilled by that company
 or by another company must be deemed unimport-
 tant in the absence of any provision indicative of
 the contrary. The interest derived by the grantee,
 though it remain only afloat, is a vested interest,
 and it is held under the same limitations which ap- 650
 ply after it develops into an estate in particular
 lands until extinguished by forfeiture for non-per-
 formance of the condition annexed to the grant. I
 perceive no legal obstacle arising out of the grant
 itself to a transfer of such interest by the grantee
 to another company, and should the latter con-
 struct the road contemplated agreeably to the re-
 quirements of the grant, and thus accomplish the
 end which Congress had in view, I submit that it
 would clearly be entitled to the benefits thereof.

The question of the assignability of the interest
 of the grantee would be more difficult if, after
 definitely locating the line of its road, and thus
 attaching the grant to particular lands along the 651
 same, it was proposed to transfer that interest to
 another company for the benefit of a road to be
 constructed by the latter on a different line, though
 following the general course of the other road.
 But in the present case the facts give rise to no
 such difficulty. The grant had not previous to the
 transfer become thus identified with a particular
 line of road, and was thereafter susceptible of loca-
 tion upon the line of the road projected by the
 assignee (the New Orleans Pacific Company), pro-
 vided this road met the requirements of the grant
 in other respects, as to which no doubt is suggested.

652 My conclusion is that the assent of Congress to the assignment made by the New Orleans, Baton Rouge and Vicksburg Railroad Company as above, is not necessary in order to entitle the assignee to the benefit of the land grant in question.

The remaining questions relate to the 68 miles of railroad formerly belonging to the New Orleans, Mobile and Texas Railroad Company, but now owned by the New Orleans Pacific Company, and made a part of its main line between New Orleans and Baton Rouge.

653 The land grant in question was, as its language imports, made in *aid of the construction* of a railroad between certain termini, contemplating a road to be constructed, not one already constructed. It has not been the policy of Congress thus to aid constructed roads. Had a constructed road existed at the date of the grant, which extended from one terminus to the other, and afterward the New Orleans, Baton Rouge and Vicksburg Railroad Company, instead of entering upon and completing the construction of a road, had purchased the road already constructed, this, it seems to me, would not have satisfied the purposes of the grant so as to entitle the company to the benefit thereof. The same objection would apply were the constructed road extended over only a part of the route contemplated by the grant. So far as I am advised, the action of the Government hitherto has accorded with this view. On the other hand, if such road was constructed subsequently to the date of the grant, and is owned by the grantee or the assignee of the latter, I see no ground for excluding it from the benefit of the grant should it otherwise fulfill the requirements thereof.

654

Agreeably to the foregoing views, and in direct response to the several questions submitted, I have the honor to reply as follows: The first, second, and third questions I answer in the affirmative. The

fourth question (including the alternative added thereto) I answer in the negative. The fifth question I answer in the affirmative—assuming, as I do, the company named therein to be an assignee of the grantee in the act referred to. 655

I have the honor to be, very respectfully,

BENJAMIN HARRIS BREWSTER,
Attorney-General.

HON. H. M. TELLER,
Secretary of the Interior.

In order to establish the date when the Act of the Legislature of Louisiana took effect, which appears as the Act No. 100 of the Acts of 1873, page 29, the deposition of Alvin E. Hebert is read in evidence. 656

Defendants' Exhibit B.

The examination of ALVIN E. HEBERT *de bene esse*, beginning on the eleventh day of February, 1915, at 10:45 P. M., on behalf of the defendant, The Texas and Pacific Railway Company, before me, Vernon Porter, Notary Public, in and for the Parish of East Baton Rouge, State of Louisiana, at my office in the Reymond Building, in the city of Baton Rouge, State of Louisiana, in a certain suit now pending in the District Court of the United States in and for the Southern District of New York, in the District aforesaid, wherein DAVID J. WALLER, JR. and LEVI E. WALLER, TRUSTEES, are Plaintiffs, and the Texas and Pacific Railway Company, New Orleans Pacific Railroad Company and Union Trust Company of New York are defendants. 657

ALVIN E. HEBERT, a witness produced on behalf of the defendant, Texas and Pacific Railway Com-

658 pany, being first duly sworn, deposes and says as follows:

Q. Mr. Hebert, where do you reside?

A. I reside in the city of Baton Rouge, Louisiana.

Q. What official position do you hold?

A. I am Secretary of State of the State of Louisiana.

Q. Is it a part of your duties as Secretary of State to keep in your custody the official records of the proceedings of the House of Representatives and the Senate of the State of Louisiana and also the acts passed by them?

A. Yes.

659 Q. I wish to ask you, Mr. Hebert, certain questions relative to Act No. 100 of the Acts of the Legislature of the State of Louisiana of 1872 passed at the first session of the Legislature of that year—Will you please tell me what the records in your custody show was the date on which this Act was passed?

A. According to the records in the office of the Secretary of State, I beg to state that the following is shown: The Senate Journal of 1872 shows that Act No. 100 of 1872, which was Senate Bill No. 267, passed the House on February 26th, 1872. It is reported in said Senate Journal as having been con-
660 curred in by the House on that date; said Senate Journal shows that the bill passed the Senate on February 21st, 1872.

Q. What do the records show was the date on which this Act No. 100 of 1872 was presented to the Governor of the State of Louisiana for approval?

A. According to a notation on the back of the original Act No. 100 of 1872, the said Act was presented to the Governor for his signature on March 6th, 1872.

Q. What do the records show was the date on which the Legislature which passed this Act adjourned?

A. The Senate Journal shows that the Legislature which passed this Act adjourned on February 29th, 1872. 661

Q. What do the records show was the next day after February 29th, 1872, on which a meeting of the Legislature of Louisiana was held?

A. According to the title page of the Acts of 1873, the next Legislature convened in extra session on December 9th, 1872.

Q. What do the records show was the date on which the Governor of the State of Louisiana approved Act No. 100 of 1872?

A. Both the original and printed Act No. 100 of 1872 show that the Act was approved on December 11th, 1872 by H. C. Warmoth, Governor of the State of Louisiana, and notation just after the Governor's signature, as follows: 662

"The foregoing act having been presented to the Governor for his approval on the 6th day of March, 1872, and not having been returned by him to the House in which it originated on the first day of the meeting of the General Assembly after the expiration of the five days allowed by the Constitution of the State has become a law without his approval."

which notation is signed by George E. Bovee, Secretary of State. 663

ALVIN E. HEBERT
Secretary of State

The notice and certification being duly attached to this Deposition, it is stipulated, need not be printed.

Defendant offers Article No. 123 and No. 176 of the Constitution of Louisiana, of which the court takes judicial notice.

Defendant offers Act of Legislature of Louisiana, approved Feb. 19th, 1876, being Act No. 14, acts

664 of 1876, page 28, chartering the New Orleans Pacific Railway Co.

Also Act No. 12, acts of 1878, page 37, approved Feb. 5th, 1878.

Under Sub-division F of Answer, Defendant introduces the assignment of the New Orleans, Baton Rouge and Vicksburg Railroad Co. to the New Orleans Pacific, dated Jan. 5th, 1881.

Defendants' Exhibit C.

665 This indenture, made the fifth day of January, one thousand eight hundred and eighty, between the New Orleans, Baton Rouge and Vicksburg Railroad Company, a corporation created and existing under and by virtue of a special act of the legislature of the State of Louisiana, approved December 30th, 1869, party of the first part, and the New Orleans Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the State of Louisiana, party of the second part, witnesseth—

666 That the said party of the first part, for and in consideration of the sum of one dollar lawful money of the United States of America to it in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is thereby acknowledged, and of other good and valuable considerations, has remised, released, and quit claimed, and by these presents does remise, release, and quitclaim unto the said party of the second part and to its successors and assigns forever.

All the right, title, and interest of the said party of the first part, its successors or assigns of, in, or to a certain grant of public lands granted to the said party of the first part by an act of the Con-

gress of the United States, approved March 3d, 667
1871, and entitled "An act to incorporate the Texas
Pacific Railroad Company and to aid in the con-
struction of its road, and for other purposes," to-
gether with all and singular the tenements, heredit-
aments, and appurtenants thereunto belonging, or
in any wise appertaining, and the reversion and
reversions, remainder and remainders, rents, issues,
and profits thereof.

To have and to hold all and singular the above
mentioned and described premises, together with
the appurtenances, unto the said party of the sec-
ond part, its successors and assigns forever.

In witness whereof the said party of the first 668
part hath caused its corporate seal to be hereunto
affixed, and these presents to be signed by its presi-
dent and secretary the day and year first above
written.

W. H. BARNUM, President.

WM. M. BARNUM, Secretary.

Sealed and delivered in
the presence of

CHAS. L. BEAMAN,

CHAS. EDGAR MILLS.

CHARLES NETTLETON, [SEAL.]

Commissioner for Louisiana in New York.

669

STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered that on this 5th day of Jan-
uary, A. D. 1881, before me, CHARLES NETTLETON,
a commissioner of the State of Louisiana in New
York, residing in said city of New York, personally
appeared WILLIAM H. BARNUM, president, and
WILLIAM M. BARNUM, secretary, to me well known
to be the individuals named in, and who executed,
the foregoing instrument, and acknowledged to me
that they did sign, seal, and deliver the same as

670 their free act and deed on the day and year therein mentioned, and for the consideration, uses, and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal this 5th day of January, A. D. 1881.

[SEAL]

CHARLES NETTLETON

Commissioner for Louisiana in New York,
117 Broadway N. Y. City.

STATE OF NEW YORK,)
City and County of New York,) ss:

671 I, CHARLES NETTLETON, a commissioner duly appointed by the governor of the State of Louisiana, to take the acknowledgment and proof of deeds and other instruments, to be recorded in said State of Louisiana, do hereby certify that WILLIAM H. BARNUM, president, and WILLIAM M. BARNUM, secretary, who are personally known to me to be such officers, and to be the identical persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledge that as the president and secretary of "The New Orleans, Baton Rouge and Vicksburg Railroad Company," they signed, sealed, and delivered the foregoing instrument with the corporate
672 seal of the said railroad company thereto affixed, as the free and voluntary act and deed of the said company for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal this 5th day of January, A. D. 1881.

[SEAL]

CHARLES NETTLETON,

Commissioner for Louisiana in New York,
117 Broadway, N. Y. City.

OFFICE OF THE NEW ORLEANS, BATON ROUGE 673
 AND VICKSBURG RAILROAD COMPANY,
 No. 150 Broadway, New York,
 December 29, 1880.

At a special meeting—duly called—of the board of directors of the New Orleans, Baton Rouge and Vicksburg Railroad Company held this day at the office of the company there was present a quorum of the board.

In the absence of the president of the company, Mr. Simpson was called to the chair.

On motion duly seconded, the following resolution was unanimously adopted:

674

RESOLVED, That the president and secretary of this company be and they are hereby authorized to transfer to the New Orleans Pacific Railway Company, on such terms as they shall see fit, all the right, title and interest of this company in and to the land granted to this company by an act of Congress approved March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road and for other purposes," and to make and execute in the name of this company such deed or instrument as shall be necessary to complete such transfer.

675

On motion the meeting was adjourned subject to the call of the president.

WM. M. BARNUM,
 Secretary.

STATE OF NEW YORK, }
 City and County of New York, } ss:

WILLIAM M. BARNUM, being duly sworn, says that he is secretary of the New Orleans, Baton Rouge and Vicksburg Railroad Company, and that the above is a true copy of the minutes of a meet-

676 ing of the said company held on the 29th day of December, 1880.

WM. M. BARNUM.

Sworn to before me this 30th day of December, 1880.

[SEAL.]

JAS. G. JANEWAY,

Notary Public (No. 42), N. Y. County.

Under sub-division G of answer, defendant offers the following:

677 **Exhibit D.—Same as Compls. Exhibit 22.**

Defendants' Exhibit E.

J. K. McC.

DEPARTMENT OF THE INTERIOR,

WASHINGTON, March 13, 1883.

SIR:

678 The New Orleans Pacific Railway Company applied to this Department more than a year ago for a transfer to itself of the lands granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company by the twenty-second section of the act of Congress approved March 3, 1871, presenting, at the same time, satisfactory proofs of said transfer as between the two companies. I have delayed action thereon for many months, against the persistent pressure of parties in interest, in the expectation that Congress might legislate upon the subject-matter thereof; but that body having adjourned without action thereon, and knowing of no reason for further delay, I have now the honor to submit the same for your consideration.

In reply to my predecessor's request of January 5, 1882, the Attorney-General, under date of June 12 ultimo, submitted to him an opinion (copy herewith) that the grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company was a grant *in presenti*; that that company had an assignable interest in the lands granted to it; that the New Orleans Pacific Railway Company is such a successor to or assignee of the New Orleans, Baton Rouge and Vicksburg Company as is contemplated by the act of March 3, 1871; that even if the New Orleans, Mobile and Texas road was constructed subsequently to the date of said act, so much of its road as is now owned by the New Orleans Pacific Company, is such a road as is contemplated for acceptance by the President within the meaning of said act, and that patents may issue to the latter company for lands opposite to and coterminous with such constructed portion of road. 679 680

I also submit herewith a copy of the report of the Senate Committee on Railroads (under date of June 7, 1882,) declaring that, in its judgment, no considerations of public policy require a forfeiture of the grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company; and also two letters (herewith) under date of December 15 last, from Hon. L. E. Payson, of the House Judiciary Committee, in one of which he notifies this Department that upon that day, at a meeting of the committee, he had formally withdrawn the pending resolution offered by him at the previous session of Congress for a forfeiture of said grant. In the other, after stating his request in October last for a suspension of Department action, until he could be heard before the House Judiciary Committee upon the matter, he elaborately discusses the questions involved, and announcing that, after conference with them, the Senators and House delegation from Louisiana interpose no opposition to immediate action by 681

682 this department, and that his own objections are disposed of and withdrawn, states his conclusions that the New Orleans Pacific Company is entitled to the grant, both under the law and the equities of the case, and that the rights of settlers are fully protected.

I have also the honor to submit herewith two reports on the New Orleans Pacific Railway by Mr. Thomas Hassard, whom you appointed commissioner to examine completed portions of said railway.

683 The first report bears date 26th of October, 1881, and has not been submitted to you at an earlier date on account of the controversies heretofore in question.

The portions of said railway examined and at that time reported on extend from the west bank of the Mississippi River, opposite Thalia street, New Orleans, La., in a northwesterly direction, near said river, 60 miles, to near the town of Donaldsonville, in T. 11 S., R. 15 E.; also from Bayou Lamourie, in T. 2 N., R. 1 E., to a point in T. 4 N., R. 2 W., a distance of 20 miles; also from the junction of said railway with the Texas and Pacific Railway, in Shreveport, La., southwardly to T. 10 N., R. 12 W., a distance of 50 miles.

684 The second report bears date 15 of November, 1882, and relates to such portions of said railway as were not examined and reported on in October, 1881, amounting to 198 miles, lying between New Orleans and Shreveport.

The commissioner reports said portions of road, 328 miles in all, as constructed in substantial compliance with law and the instructions of this department.

In view of the facts and the law of the case, I regard the New Orleans Pacific Railway Company as the lawful assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, and en-

titled to the lands granted by the twenty-second 685
 section of the act of March 3, 1871, to said latter
 named company, and to patents therefor in so far
 as it has earned or hereafter may earn the same
 under that act, with the exception below named,
 and recommend that you accept said 328 miles of
 said road, less and exclusive of 68 miles of the line
 of said New Orleans, Baton Rouge and Vicksburg
 road, extending from New Orleans to White Cas-
 tle, between New Orleans and Shreveport (to
 which 68 miles the New Orleans Pacific road has
 withdrawn its claim and right to receive lands un-
 der the twenty-second section of said act) and that
 patents for such lands as may have been earned by 686
 the construction be issued to the New Orleans Pa-
 cific Railway Company (exclusive, nevertheless, of
 lands along said 68 miles) on their compliance with
 the law and regulations in such case made and pro-
 vided.

These patents will, of course, be subject to rights
 acquired by any person or corporation prior to the
 act of March 3, 1871.

Requesting that the inclosure herewith be re-
 turned to this Department when no longer needed
 for the purposes hereof,

I am, very respectfully,

H. M. TELLER,

Secretary.

687

The President.

(Indorsements:) Department of the Interior,
 March 13, 1883. H. M. Teller, Secretary, submits
 to the President report of commissioner on 328
 miles of the New Orleans Pacific Railroad, with
 recommendations.

EXECUTIVE MANSION,

March 16, 1883.

The within recommendations are approved.

CHESTER A. ARTHUR.

688 **Exhibit F.—Same as Compts. Exhibit 23.**

Defendants' Exhibit G.—Same as Compts. Ex. 23.

Defendant refers to Act of Congress, approved July 31st, 1876, Chap. 246, 19 Statutes at Large, 102; also Act of Congress, Feb. 8th, 1887, Ch. 120, 24 Statutes at Large, 391.

689

Defendants' Exhibit H.—Same as Compts. Ex. 26.

Defendant offers copies of Patents Nos. 1, 2, 3, 4 to the New Orleans Pacific Railway, assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Co., under date Mch. 3rd, 1885, signed by President Chester A. Arthur.

Also Patents Nos. 5 and 6, dated Aug. 8th, 1889, signed by President Harrison.

Also Patent No. 7, dated Nov. 8th, 1889, signed by President Harrison.

The total acreage covered by said seven patents being 835,653 acres.

Defendant presented a certificate from the Sec'y of State of Louisiana, showing the "Articles of consolidation" New Orleans Pacific Railway Co. with the Texas and Pacific Railway Co., June 20th, 1881, which is Exhibit "B" to its Answer, was filed for record on that date in his office and is duly recorded in the Book of "Messages and Proclamations" at page folio 221, on June 29th, 1881.

Defendants' Exhibit P.

691

In support of defense of *Res adjudicata* in Answer Defendant introduces the judgment Roll, in case of Jno. F. Dillon and Henry M. Alexander Trustees, against the New Orleans Baton Rouge and Vicksburg Railroad Co. and others, including the Union Trust Co. trustee under the alleged mortgage of Sept. 4, 1872.

**Bill of Complaint.—Filed March 3rd.,
1890.**

692

TO THE HONORABLE THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE FIFTH JUDICIAL CIRCUIT AND EASTERN DISTRICT OF LOUISIANA.

JOHN F. DILLON and HENRY M. ALEXANDER, both of the City of New York, and who are both citizens of the said State of New York, and Trustees as hereinafter set forth, bring this their Bill against the NEW ORLEANS PACIFIC RAILWAY COMPANY, a corporation created by and under the laws of the State of Louisiana, and a citizen of the said State of Louisiana:

693

Against the NEW ORLEANS, BATON ROUGE AND VICKSBURG RAIL ROAD COMPANY, a corporation created by and under the laws of the State of Louisiana, and a citizen of the said State of Louisiana:

Against ALBERT H. LEONARD of the City of New Orleans, and a citizen of the State of Louisiana;

Against JOHN B. CROOKS of the State of Arkansas, and a citizen of the said State of Arkansas:

Against EDWARD LANDER of the District of Columbia:

694 Against EVERETT H. CARTER of Fort Worth, Texas, and a citizen of the said State of Texas:

 Against THE UNION TRUST COMPANY, of New York, a corporation created by and under the laws of the State of New York, and a citizen of the said State of New York:

AND THEREUPON YOUR ORATORS COMPLAIN AND SAY:

 FIRST. That by the twenty-second section of the Act of the Congress of the United States of March 3rd, 1871, entitled "An Act to incorporate the TEXAS & PACIFIC RAILWAY COMPANY, and to aid in the construction of its road, and for other purposes" 695 there were granted to the said NEW ORLEANS BATON ROUGE AND VICKSBURG RAIL ROAD COMPANY and its assigns to aid in the construction of a railroad from New Orleans to a connection with the TEXAS & PACIFIC RAILWAY COMPANY at its eastern terminus at Shreveport, in the State of Louisiana, the same number of alternate sections per mile, of public lands of the United States within the State of Louisiana, as were by the said act granted in the State of California to the TEXAS & PACIFIC RAILWAY COMPANY, being ten sections per mile on each side of the said rail road, or in all twenty sections per mile as the rail road should be definitely located 696 and constructed, with the right also to eventually acquire lands which were not found in place, within the indemnity limits prescribed by the said Statute, as by the said Act of Congress Chapter 122 of the public Acts of 1871 will more fully appear, the said Act being referred to as part hereof.

 SECOND. That the New Orleans, Baton Rouge and Vicksburg Rail Road Company never filed any map of definite location of its road and never built any rail road, but on or about the fifth of January, 1881, it transferred its rights under the said Act of Congress of 1871 to the said New Orleans Pacific

Railway Company, by deed of which a copy is annexed as part hereof, and under the following circumstances: 697

On the 19th of February, 1876, the Legislature of the State of Louisiana passed an Act entitled "An Act to confirm the notarial charter of the New Orleans Pacific Railway Company; to extend the term of existence of the said Company and to confer thereon certain powers and franchises" as by the said Act which is hereby referred to and made part hereof will more fully appear, being the Act No. 14 of 1876 of the General Assembly of the State of Louisiana: That by the said Act and by its charter, the said New Orleans Pacific Railway Company was authorized to construct a rail road from the City of New Orleans, through the State of Louisiana to a connection with the Texas & Pacific Railway at Shreveport. That prior to 1880 the New Orleans Pacific Railway Company had built and graded but a small part of its road, and the New Orleans Baton Rouge and Vicksburg Rail Road Company had never graded or built any portion of its road and was unable so to do. That in 1880 the New Orleans Pacific Railway Company found it would be enabled to raise means to construct its road provided it should be able to acquire any right which the New Orleans Baton Rouge and Vicksburg Rail Road Company might have under the said Act of Congress of March 3rd, 1871, and that therefore the said deed of January 5th, 1881 was executed in pursuance of contracts previously made thereto and the Department of the Interior of the United States was notified of the said transfer to the said New Orleans Pacific Railway Company. That on the 21st day of February, 1881, the Commissioner of the General Land Office of the United States recognized the transfer to the New Orleans Pacific Railway Company to be complete. That on the faith thereof the said New Orleans Pa- 698 699

- 700 cific Railway Company proceeded with the construction of the said rail road as required by the Act of Congress, and on the 27th day of October, 1881, duly filed in the Department of Interior a map of definite location of part of its road, and on the 17th of November, 1882, likewise filed with the Department of the Interior a map of definite location of the rest of its road between New Orleans and Shreveport and completed the said road between New Orleans and Shreveport as required by the Acts of Congress. That Commissioners were appointed by the Secretary of the Interior to examine the road so constructed by the New Orleans
- 701 Pacific Railway Company, who reported that the same had been constructed in full compliance with the Acts of Congress on that behalf, which reports were laid before the Secretary of the Interior, and on March 13th, 1883, that officer found and decided that the New Orleans Pacific Railway Company had the right to receive the lands under the twenty-second section of the said Act of Congress of 1871 for and with reference to two hundred and sixty miles of rail road, from White Castle to Shreveport, and that patents for such lands as may have been earned by the said New Orleans Pacific Railway Company should be issued to it which finding and decision was laid before the President of the
- 702 United States, who on the 16th day of March, 1883, as authorized by and conformably to the said Act of Congress of March 3rd, 1871, endorsed the same "The within recommendation approved, Chester A. Arthur, President." That by reason of the said construction of the said rail road by the said New Orleans Pacific Railway Company whereby it earned the said lands, on or about the 3rd of March, 1885, patents of the United States for about Six hundred and seventy-nine thousand, two hundred and eighty-seven and 64/100 (679,287.64/100) acres of land were under the decision of the Secretary of

the Interior and of the President of the United States issued to the said New Orleans Pacific Railway Company as by the said patents numbered respectively, One, Two, Three and Four and referred to as part hereof will more fully appear; and of which forms are hereto annexed and marked "A-B-C-and D." 703

And other patents have been issued as herein-after set forth.

That said Land Grant is situate partly in the Eastern District of Louisiana and partly in the Western District, and of the said patented selected and confirmed lands, upwards of fifteen hundred acres (1500) of a value exceeding Four thousand Five hundred Dollars (\$4,500.00) are situated in the Eastern District of Louisiana, and within the jurisdiction of this Honorable Court. 704

THIRD. That by the Act of March 3rd, 1871, section 22, the said land grant was conditioned that the said New Orleans Baton Rouge and Vicksburg Rail Road Company should complete the whole of the said road—that is from New Orleans to a connection with the terminus of the Texas & Pacific Railway Company at Shreveport within five years from the passage of the said Act, to-wit: five years from the 3rd of March, 1871, and that within the said five years neither the Rail Road Company last named nor any other Rail Road Company did complete the said road or commence the construction thereof and that the same was afterwards constructed by the New Orleans Pacific Railway Company who filed maps of definite location as hereinbefore stated, and that in view of the equities arising in favor of the New Orleans Pacific Railway Company by reason of the actual construction of the said road and only by it and at its own expense, the Congress of the United States by Act approved February 8th, 1887, and which is referred to as part 705

706 of this Bill, enacted that the Patents for the Six
 hundred and seventy-nine thousand, two hundred
 and eighty-seven and 64/100 (679,287.64/100)
 acres of lands patented to the New Orleans and
 Pacific Railway Company on or about the 3rd of
 March, 1885, be and the same are hereby confirmed,
 and also enacted that the title of the United States
 and the original grantee of the lands granted by
 the said Act of Congress of March 3rd, 1871, to the
 New Orleans Baton Rouge and Vicksburg Rail
 Road Company not herein declared forfeited are
 relinquished, granted and confirmed to the New
 Orleans Pacific Railway Company, assignee of the
 707 New Orleans Baton Rouge and Vicksburg Rail
 Road Company, the said lands to be located in ac-
 cordance with a map filed by the New Orleans
 Pacific Railway Company in the Department of the
 Interior October 27, 1881, and November 17th,
 1882, which indicated the definite location of the
 said road.

That by means and force thereof the legal title
 of the United States in and to the said lands, free
 from any lien attempted to be granted by the New
 Orleans Baton Rouge and Vicksburg Rail Road
 Company, was conveyed to the New Orleans Pacific
 Railway Company and is so held by that Company
 708 and its equities to have and hold the same are
 superior to all others and specially to the claims
 hereinafter set forth under certain alleged mort-
 gages to the Union Trust Company of New York.

FOURTH. That the said lands have been utilized
 by the said New Orleans Pacific Railway Company
 to enable it to construct its road, and were used
 and appropriated in part payment of the cost of con-
 structing the same by the issue of bonds secured by
 mortgage thereon and it was necessary for the New
 Orleans Pacific Railway Company to utilize the said
 lands in the said method in order to construct its

said road. That after the construction of the said road and in order to obtain the said patents and to administer the said lands in accordance with the intention of the Acts of Congress hereinbefore recited, the New Orleans Pacific Railway Company has been obliged to and has paid large expenses for surveying selecting, and conveying the said lands and for annual taxes upon the same, amounting to about Seventy-five thousand Dollars (\$75,000). 709

That by acts of mortgage dated April 18th, 1883, and of January 5th, 1884, and duly recorded in the said years in the Parishes where the said lands are situated, which mortgages, are referred to as part hereof, and copies of which are annexed hereto and marked "E and F," the New Orleans Pacific Railway Company made and executed in favor of your Orators as Trustees, a Land Grant and Sinking Fund Mortgage of all of the lands acquired by the said New Orleans Pacific Railway Company from the United States in virtue of its construction of the said rail road, to secure the payment of its land Grant and Sinking Fund Bonds limited to the issue of \$2.50 per acre as will more fully appear by reference to the said Acts of Mortgage made part hereof. That this mortgage is an existing and valid first lien upon the said lands. That the bonds issued in pursuance of the said mortgages of 710
18th April, 1883 and January 5th, 1884, are outstanding in the hands of bondholders for value, except so far as the same have been actually exchanged in pursuance of the operations of the said Acts of Mortgage for lands so patented by the United States, March 3rd, 1885, to the New Orleans Pacific Railway Company. That the said Act of March 3rd, 1883, to your Orators was duly recorded in the proper Parishes of Louisiana in the same year, and the Act of Mortgage of January, 1884, was in like manner recorded in 1884. 711

That pursuant to the Trust created by the said

- 712 Acts of Mortgage to your Orators and conformably to the provisions thereof, your Orators as Trustees, prior to the bringing of this suit in order to raise money to pay the taxes on the mortgaged lands, to pay the expenses of the Trust, and in exchange for bonds issued under and secured by the said Acts of Mortgage of over One Million Dollars (\$1,000,000) in amount, have sold and conveyed to divers and various purchasers whose conveyances are of record in the several parishes where the said lands are situated before this suit was brought,—about Three hundred thousand (300,000) acres of the said lands so patented as aforesaid, the particular description
- 713 of the lands so sold and conveyed, and the bonds so exchanged therefor shall be rendered and stated as the Court may require, and the balance of the said lands together with sundry lands in the Eastern and Western Districts of Louisiana, which have been conveyed by the Patents of the United States numbered “5 and 6” referred to as part hereof, still remain in the possession, control and administration of your Orators and of the New Orleans Pacific Railway Company under the provisions of the said Mortgage and Deed of Trust.

- Your Orators aver and state that the New Orleans Pacific Railway Company and your Orators
- 714 are *bona fide* purchasers and mortgagees of the said patented lands and every part thereof having and holding the legal title and possession thereof for full value actually paid, and without any notice of the alleged mortgage lien firstly hereinafter set forth in the alleged mortgage of October 1st, 1870, and without any reason to suspect any such lien, and also free from and clear of any lien arising from the mortgage of 1872 hereinafter set forth and for the reasons hereinafter stated with respect to the same.

FIFTH. That on the first of October, 1870, one 715
 Thomas C. Bates averring himself to be the President of the said New Orleans Baton Rouge and Vicksburg Rail Road Company executed before Thomas J. Beck, Notary, in New Orleans to the said Union Trust Company of New York, Trustees, purporting to be in behalf of the said last named Company, to secure Sixty-two hundred and fifty (6,250) bonds of One thousand dollars (\$1,000.00) each averred to have been made by the said Company and paraphed by the said Notary, the said bonds having forty years to run and bearing eight per cent. per annum interest. That in the said Acts of Mortgage the property claimed to have been 716
 hypothecated and affected thereby is described as follows:

"The whole of the main line of the railroad of the said Company within the State of Louisiana, commencing at Pontchatoula in the Parish of Livingston, and extending thence to the City of Baton Rouge in the Parish of East Baton Rouge, forty-four miles more or less; thence through the parishes of East Baton Rouge and East Feliciana to the State line of the State of Louisiana, forty-five miles more or less: Also a branch road commencing at the said City of Baton Rouge and extending thence 717
 through the Parishes of West Baton Rouge, Iberville, Pointe Coupee, St. Landry, Avoyelles, Rapides by way of Alexandria, through Natchitoches and De Soto Parishes to the City of Shreveport in Caddo Parish or to some other point on the Texas Pacific Railroad in the Parish of Caddo between Shreveport and the State line of the State of Texas, two hundred and thirty-six (236) miles more or less: Also another branch railroad commencing from the branch road last described and extending thence by way of the town of Washington to Opelousas in the Parish of St. Landry, sixteen miles

- 718 (16) more or less: Also another branch rail road commencing on the main line of the said first described road in the Parish of Baton Rouge extending through the Parishes of Ascension, St. James, St. John, St. Charles and Jefferson to the City of New Orleans, eighty-five miles more or less: And also another branch road commencing on the said first described railroad at Pontchatoula and extending thence through (in a northeasterly direction) the Parishes of Tangipahoa, St. Tammany, Washington to the State line of the State of Mississippi, connecting with the New Orleans and Meridian Rail Road, seventy-five (75) miles more or less, in
- 719 all Five hundred and One (501) miles more or less of rail road within the State of Louisiana, together with the rights of way, road bed, rails, depots, stations, sheds, buildings, machinery, tools, engines, cars, tenders, and other rolling stock: Also all real and personal estate within the State of Louisiana owned by the said Company at the date of this Mortgage or which may be acquired by it thereafter appurtenant to or necessary for the operation of the main line of railroad or any of the said branches connecting therewith: Also all other property, real and personal of every kind and description whatsoever and wherever situated in the State of Lou-
- 720 isiana, which is now owned, or which shall hereafter be acquired by the said Company and which shall be appurtenant to or necessary or used for the operation of the said main line of rail road, or any of its branches: And also the tenements, hereditaments and appurtenances thereunto belonging, and all of the estate, right, title and interest, legal and equitable of the said Company and its successors and assigns therein, together with the corporate franchises and privileges of the said Company at any time granted or to be granted by the State of Louisiana relative to the construction, operation and use of the said railroad, within the

said State. Copy of the said act of mortgage is hereto annexed as an exhibit to this bill and and marked "G". That the said mortgage so made by the said Bates was recorded in various Parishes in Louisiana before any land grant was ever made as aforesaid, and when the said New Orleans Baton Rouge and Vicksburg Rail Road Company had no power to accept or mortgage the said land grant; and this will further appear by the Act No. 100 of the Acts of 1872 of the General Assembly of Louisiana which is referred to as part hereof. And it appears by the Act of the General Assembly of Louisiana of December 30th, 1869 incorporating the said New Orleans Baton Rouge and Vicksburg Rail Road Company, and by the power to mortgage therein given and limited, and by the description of the premises purporting to be mortgaged as aforesaid, that the said mortgage of 1870 did not and could not include, cover, or affect by lien, any of the said lands sold by and patented to or to be patented as aforesaid to the New Orleans Pacific Railway Company.

SIXTH. That nevertheless it is claimed on the behalf of the holders of upwards of two hundred bonds secured by the said mortgage of 1870, the Union Trust Company of New York being the Trustee of the said Mortgage, that the said Mortgage of October 1st, 1870, is a lien on the said lands so granted by the Act of Congress of 1871 (March 3rd) and that it is also prior to the lien and Mortgage as aforesaid made by the New Orleans Pacific Railway Company in favor of your Orators as Trustees. That the said John B. Crooks whose specific residence in Arkansas is unknown to your Orators, claims to be the owner of five of the said bonds secured by said mortgage of 1870, Nos. 186, 187, 1888, 199 and 195 and the said Edward Lander claims to be the owner of three of the said bonds secured by said

- 724 Mortgage of 1870, Nos. 185, 190 and 194. That on or about the 30th day of March, 1888 the said Crooks filed his certain Bill of Complaint in the United States Circuit Court for the Western District of Louisiana at Shreveport in the cause No. 135 in Equity, the proceedings wherein are referred to as part hereof, against your Orators and the New Orleans Pacific Railway Company and the Union Trust Company and others, and certain proceedings were had and pleadings filed and testimony in the said cause was taken, and the cause made ready for hearing, and duly set down for hearing at Shreveport in the said District for the
- 725 24th of February, 1890.

That the said Complainant Crooks although all of the testimony had been taken and reduced to writing in form, and stipulations on both sides entered into and although he claimed no legal ground for a continuance, yet declined to proceed with the cause and the same was on motion dismissed. The said Edward Lander had filed a motion to intervene in the said cause, but the said motion had never been granted by any order of Court, nor entered upon any docket, chancery order book or book of minutes, and the said motion fell with the dismissal of the said suit. Yet your Orators show that

726 the said Crooks through his Solicitor the said Albert H. Leonard has announced his intention to renew the said suit, the right and equity to do which he is denied, and to put your Orators to great expense, delay and useless trouble, and the said Edward Lander will attempt to renew his intervention in the said suit.

Your Orators further show that Albert H. Leonard of the City of New Orleans is the agent and attorney of the said John B. Crooks and Edward Lander and has in his possession and under his control the said bonds claimed to be owned and held by them and they further show that the said

Leonard has also in his possession and under his administration and control about two hundred other bonds of the same denomination and issue, the owners of which are unknown to your Orators, and they further show that the holders of the said bonds thro' the said Leonard will continue to bring suits thereupon claiming a prior lien upon the said patented lands by virtue of the said alleged mortgages of October 1st, 1870, and will harass and annoy your orators with a multiplicity of suits, and put your Orators to great expense and trouble annoyance and vexation, and cast a cloud upon the rights of your Orators as Trustees and Mortgagees of the said lands and premises, and entirely embarrass, impede and cripple your Orators in the administration of their said Trust. 727

That a portion of the said Land Grant so mortgaged to your Orators is situated in the Western District of Louisiana; and the value of the lands still remaining unsold under the provisions of your Orators Trust are of great value, to-wit: of a value exceeding Three Hundred thousand dollars, (\$300,000.00) and other patents of the United States are about to issue for the remaining portions of the said lands in the Eastern District of Louisiana as by the list of selections referred to and made part hereof will more fully appear. 728

That pursuant to the provisions of the said mortgage to your Orators, the said patented lands are being offered for sale under and pursuant to the Trust and your Orators are continually embarrassed and prevented from selling the same and so from executing their duties and realizing the true value of the said lands and fulfilling the intent of the said Acts of Congress by reason of the illegal claims set up as aforesaid, viz: 729

That the said Mortgage of October 1st, 1870, alleged to have been made by the New Orleans, Baton Rouge & Vicksburg Rail Road Company is

- 730 a prior lien on the said lands; and they aver that the claim of the said bondholders known and unknown, represented by the said Albert H. Leonard as their agent in the City of New Orleans, and of which the Union Trust Company of New York is the Trustee, and of unknown holders of any other bonds of said issue, is a cloud upon the title of your Orators as Mortgagees and Trustees as well as upon the title of their Mortgagor and Grantor, and inflicts continuous and irreparable injury upon your Orators as well as upon their said Mortgagor. That as the said Mortgage of October 1st, 1870, and the said outstanding bonds secured thereby do not
- 731 mature for many years, your Orators will continue to be embarrassed and injured thereby irreparably and for this long period of time, and will be exposed with respect to a multiplicity of suits such as have been hereinbefore set forth and other similar suits, and this Court has full jurisdiction under the rules of Equity and the Acts of Congress to remove the said cloud from upon the title of your Orators and of its said Mortgagor, and to call in all of the defendants with respect thereto.

- SEVENTH: Your Orators further show that on or about the 4th of September, 1872, one Calvin H.
- 732 Allen representing himself to be the President of the said New Orleans, Baton Rouge and Vicksburg Rail Road Company and assuming to act under the authority of the said Company by an act before T. J. Beck a Notary Public in the City of New Orleans made and executed a certain mortgage alleged to be on behalf of the said last named Company to secure the intended issue of Twelve thousand bonds of One thousand dollars (\$1,000.00) each, payable on the 1st of September, 1902, with semi-annual interest at the rate of seven per cent. per annum, the said mortgage being made in favor of the Union Trust Company of New York and your Orators are

informed and believe that about Twelve hundred (1200) of the said bonds have been issued and are now outstanding whereof your Orators are the holders and lawful owners of Eleven hundred and eighty-three (1183) of the said bonds—a copy of which said mortgage is hereto annexed and made part hereof as Exhibit “H,” wherein the said Company undertook to mortgage and hypothecate as security for the said bonds, the rail roads of the said New Orleans, Baton Rouge & Vicksburg Rail Road Company, and also all of the right, title and interest, claims, demands and estate that the said mortgagor had or might have or be entitled to in or to the lands or sections of lands situate, lying and being on either side of the said New Orleans, Baton Rouge & Vicksburg Rail Road Company, as the same might be finally located or constructed in accordance with and as granted by the said Act of Congress of March 3rd, 1871.

Your Orators further show that the said Everett H. Carter made a defendant herein and who is represented in the State of Louisiana, in the Eastern District by Albert H. Leonard of the City of New Orleans claims to hold two of the said bonds of One thousand dollars (\$1,000.00) each being Nos. 1059 and 1037 with the coupons attached thereto. That the said mortgage was recorded in the Mortgage Office of the Parish of Orleans, the domicile of the said Company on the 4th of September, 1872, but has not been reinscribed. Your Orators can not say who hold the bonds which have been issued under the said mortgage to the Union Trust Company of New York other than the Eleven Hundred and Eighty-three (1183) held by your Orators and the two claimed to be held by the said E. H. Carter. As to the said two claimed to be held by the said Carter, they aver that they are in the possession and under the entire control and administration of the said Albert H. Leonard and they show

- 736 that in or about the month of March, 1888, the said Leonard, as Solicitor for the said Everett H. Carter, filed a certain bill in the United States Circuit Court for the Fifth Judicial Circuit and Western District of Louisiana at Shreveport in cause 136 of the Docket, the proceedings in which are referred to as part hereof, for the purpose of collecting the past due coupons upon the said bonds and of enforcing the said Mortgage upon the lands so as aforesaid granted by the said Patents Nos. One, Two, Three and Four to the said New Orleans Pacific Railway Company. That the said Bill was filed against the New Orleans Pacific Railway Com-
- 737 pany, against your Orators and the Union Trust Company of New York and others, and after sundry pleadings had been filed and all of the testimony had been taken and the cause had been set down for trial and hearing on the 20th of February, 1890, and the respondents then stating upon the trial that they insisted upon a trial of the merits, the said Carter dismissed his suit and a decree was entered dismissing the same, but that the said Carter through his Solicitor and said agent asserts that he will begin his said suit again, (the right to do so being denied) and your Orators show that they will be subjected to great annoyance and expense by
- 738 reason of such recurring litigation. They also allege that the said Leonard as agent for parties unknown to your Orators has in his possession and under his control certain other of the said Land Grant bonds purporting to be executed by the New Orleans Baton Rouge and Vicksburg Rail Road Company and secured by the said mortgage of September 4th, 1872.

Now they say that the said mortgage of 1872 is not a lien upon any lands patented to or selected by the New Orleans Pacific Railway Company as hereinbefore set forth. That at the time that it was made as appears upon the face of the said mortgage

the said New Orleans, Baton Rouge & Vicksburg Rail Road Company had never made any definite location of its road nor did it thereafter construct any railway or earn any lands. That the said mortgage by its terms only attempts to hypothecate lands and sections of lands that might be described, identified and earned by a final and definite location and construction of road of the said New Orleans, Baton Rouge & Vicksburg Rail Road Company, and no such definite location or construction ever took place. They aver and show that by the Constitution of the State of Louisiana of 1868 which was in force at the time that the said mortgage was made and that under and by the Constitution of 1879 which is now in force, no mortgage or privilege could affect your Orators unless recorded in the Parish where the property to be affected is situated, and they aver, charge and believe that as to many if not all of the Parishes in which the said granted lands are situated, that the said mortgage was not recorded at all. They further show that under the law of Louisiana under which the said mortgage was made, even if it had been properly recorded the effect of such recordation would cease as to your Orators in ten years from the time of such recordation, and that such mortgage has never been reinscribed and ceased to have any legal effect whatever against your Orators during the year 1882, if any legal effect it had prior to that time, which is denied. They make also this same averment with respect to the mortgage of 1870 hereinbefore set forth; that even if it were a lien upon the said lands which is expressly denied, it never was recorded at all in many of the parishes in which the said lands are situated, and if recorded was recorded after the mortgages made to your Orators, and even were it so recorded in the year 1870 or subsequent years, such recordation has ceased

742 to have any effect if any effect it had, by the lapse of ten years without reinscription.

Your Orators further show, as to the equities which they have in the premises with respect to the said mortgage of 1872, that even if it be a lien upon the said granted lands located, identified and earned by the construction of the New Orleans Pacific Railway Company from New Orleans to Shreveport yet in law and equity the lien and the said mortgage even it existed, which is denied, is and should be decreed to be subordinate to the lien and right of your Orators by reason of the mortgage made to them by the New Orleans Pacific
743 Railway Company as aforesaid.

They reiterate all of the allegations heretofore made in this Bill with respect to the organization of the New Orleans Pacific Railway Company: its acquisition of the said Land Grant: its construction of its said rail road partly by means of bonds issued under mortgage made to your Orators: its earning of the said lands: the recognition by the Executive authorities of the United States of the right of the New Orleans Pacific Railway Company to have the lands patented to it: the patenting of the said lands to the New Orleans Pacific Railway Company and the confirmation of all of the acts
744 done and conveyances made by Congress of the United States by the said Act of Congress of 1887.

They aver with respect to the said mortgage of 1872, as well as the said mortgage of 1870, that the said New Orleans Baton Rouge & Vicksburg Rail Road Company never at any time filed any map of definite location of the line of its road or of any part thereof. That the maps filed as aforesaid by the New Orleans Pacific Railway Company on the 27th of October, 1881, and on the 17th of November, 1882, were the first and only maps of definite location of the said road ever filed with the Department of Interior, and that the legal title to all of the said

lands granted by the 22nd section of the Act of Congress of March 3rd, 1871, remained in the United States at least until the said maps of definite location were filed if not until the said Patents were issued thereafter on the 3rd of May, 1885, and as to the indemnity lands, the titles remained in the United States until they were actually selected which selections were made by the New Orleans Pacific Railway Company in pursuance of its definite location and construction of its road. 745

So your Orators say and aver that title to no part of the land so patented as aforesaid, was ever in the said New Orleans, Baton Rouge & Vicksburg Rail Road Company, nor did the last named Company acquire any equity by reason of the construction of the said road or otherwise to call on the United States to convey to it the titles to the said lands or any part thereof, and your Orators further aver that the title to the said lands so patented and to all of them, proceeded from the United States directly to the New Orleans Pacific Railway Company and is so held by it in its own right absolutely and not as Trustee for the New Orleans, Baton Rouge & Vicksburg Rail Road Company or its mortgage bondholders. 746

Your Orators reiterate as to the said mortgage of 1872 as well as to the said mortgage of 1870, the allegations heretofore made with regard to the large sums expended by them and the New Orleans Pacific Railway Company in the protection of the Trust created by the mortgage to your Orators, in surveying, selecting, and conveying the said lands and in paying taxes on the same and the necessary expenditures of administration, whereof they are ready to furnish to this Honorable Court as it may require, a full account. 747

They further show that your Orators have issued under the said mortgage made to them by the New

748 Orleans Pacific Railway Company, Sixteen Hundred and Ninety (1690) bonds of One thousand Dollars (\$1,000.00) each, and that the same are outstanding in the hands of *bona fide* holders for value, except so far as the same have been actually exchanged for the lands.

They show that the legal title to the lands so patented and selected as aforesaid, were ratified by the Act of Congress of February 8th, 1887, and passed from the United States to the New Orleans Pacific Railway Company in the manner hereinbefore shown and were mortgaged to your Orators for the benefit of the Trust created in favor of the holders of the said bonds, executed by the New Orleans Pacific Railway Company, and that by reason of the actual construction of the said rail road, by the New Orleans Pacific Railway Company whereby these lands were earned by it, and by these means, its rights and equities and those of your Orators as Trustees and mortgagees are superior to any right or equity of any bondholders under the said mortgage of 1872 as well as that of 1870. They aver that the holders of the bonds issued under the said mortgages of 1870 and 1872 have slept upon their rights for many years and have never undertaken any action with respect to either of the said mortgages for at least fifteen years and by their laches have disentitled themselves to any relief against your Orators.

Your Orators aver that they are *bona fide* mortgagees and trustees of the said patented lands and to every part thereof, having the title thereto conveyed by the said mortgage and without notice of any equities arising under the said mortgage of 1872 or that of 1870. They aver that by the Act of 1871—March 3rd—section 22, making the land grant, the said land grant was conditioned that the New Orleans Baton Rouge & Vicksburg Rail Road Company or its assigns should complete the whole

of the said rail road, that is from New Orleans to 751
 a connection with the Texas & Pacific Railway at
 Shreveport within five years from the passage of
 the said Act, to-wit: five years from the 3rd of
 March, 1871, and that within the said five years
 neither the said rail road last named nor any other
 rail road company did complete the said road or
 even commence the construction thereof, but that
 the said road was afterwards constructed by the
 New Orleans, Pacific Railway Company who filed
 maps of definite location as hereinbefore stated, and
 that in view of the equities arising in favor of the
 New Orleans Pacific Railway Company by reason
 of the actual construction of the said road by it and 752
 its own expense, the Congress of the United States
 under Act of February, 1887, enacted that the pat-
 ents to the Six hundred and seventy-nine thousand
 two hundred and eighty-seven and 64/100 acres
 (679,287.64/100) of land patented to the New Or-
 leans Pacific Railway Company on or about the
 3rd of March, 1885, should be confirmed. And also
 enacted as hereinbefore set forth, that the title of
 the United States and of the original grantee to the
 lands granted by the said Act of Congress in March,
 1871, should be relinquished, granted and confirmed
 to the New Orleans Pacific Railway Company as-
 signee, the said lands to be located in accordance 753
 with the map filed by the said New Orleans Pacific
 Railway Company in the Department of the In-
 terior on October 27th, 1881, and November 17th,
 1882, which indicated the definite location of the
 said road. By means and force whereof, the same
 legal title which the United States had to the said
 lands free from any lien made or attempted to be
 made by the said New Orleans, Baton Rouge &
 Vicksburg Rail Road Company, was conveyed to
 the New Orleans Pacific Railway Company, and is
 so held by that Company and by your Orators its
 Trustees and Mortgagees and their equities to have

754 and to hold the same are superior to any lien or alleged rights or equities of the Trustees and bondholders under the said act of mortgage of 1872 as well as that of the said act of mortgage of 1870, even if they had any right with respect to the said lands which is denied.

They further show that on the 8th of August, 1889, patents of the United States to the New Orleans Pacific Railway Company for further and other lands included in the said selections under the said grant, have been duly executed and delivered and are numbered "5 and 6" respectively and are referred to as part of this bill and will be produced
 755 upon the hearing hereof and that further patents are about to be issued which said patents and selections embrace lands of said Grant both in the Western and Eastern Districts of Louisiana. They show that they hold as mortgagees the said lands so aforesaid selected, patented and confirmed by the United States to the New Orleans Pacific Railway Company free from any title, claim or right created or attempted to be created by the New Orleans, Baton Rouge & Vicksburg Rail Road Company by the said acts of mortgage, either of September 4th, 1872 or of October 1st, 1870 and ask that it should be so adjudged and decreed in this cause.

756 They show that as already averred they hold eleven hundred and eighty-three (1183) bonds of One thousand Dollars (\$1,000.00) each, with all of the coupons attached, issued or purporting to be issued under the said act of mortgage of September 4th, 1872, certified by the Union Trust Company, the numbers whereof are given in the exhibit hereto attached and made part of this Bill and marked "I."

They submit to the Court that if it should be held adjudged and decreed that the said act of mortgage of September 4th, 1872, and the bonds issued and certified thereunder, are prior liens upon the said lands so patented, selected and confirmed as

aforesaid to the New Orleans Pacific Railway Company, then that an account shall be taken of the number of the said bonds duly issued and outstanding including those held by your Orators, and in case any sale of the said lands should be decreed herein, such decree shall also embrace the bonds so held by your Orators. 757

EIGHTH. Your Orators further aver that according to the rules of equity and the terms of the said mortgages of 1870 and 1872, that the individual bondholders represented in the City of New Orleans as aforesaid by Albert H. Leonard, although they have undertaken to bring the suits hereinbefore mentioned, and threatened to bring a large number of suits of the same kind, and to put your Orators to great annoyance, expense, trouble and risk, have no right to institute such actions, and that the same can only be properly enforced (even if there be any rights under the said mortgages, which is denied,) by the Trustee of the mortgages, respectively, to-wit: The Union Trust Company of New York, and that the said bondholders represented by their said agent, Albert H. Leonard of New Orleans are threatening to bring said suits in their own names and without any demand on or co-operation of the said Union Trust Company of New York. 758

That as hereinbefore stated with respect to the mortgage of 1870, your Orators show that they and the New Orleans Pacific Railway Company are offering the remainder of the said patented, selected and confirmed lands for sale under and in pursuance of the Trust created by the said mortgages of 1883 and 1884 and they are continually embarrassed and prevented from selling the said lands and so from executing their duties and realizing the true value of the said lands, by reason of the claims set up as aforesaid under the mortgage of 1872 as well as that of 1870, and by the claim on 759

- 760 behalf of bondholders thereunder, as well as the Union Trust Company of New York that the said Land Grant Mortgage, so-called, of 1872 is a prior lien on the said lands. That the claims of the bondholders and of the Union Trust Company of New York under the said mortgage of 1872 as well as that of 1870 is a constant and continuing cloud upon the title of your Orators as Mortgagees as well as upon the title of their mortgagor and inflict continually and irreparable injury upon them and prevent them totally from properly executing the duties of their Trust. That the bonds sought to be secured by the mortgage of 1872 are not due for
- 761 many years, but that the coupons purport to fall due semi-annually and your Orators will continue to be embarrassed and injured irreparably and for this long period of time, by the illegal and unjust cloud so cast upon their title and rights and are exposed to a great multiplicity of suits and this Court has full jurisdiction under the rules of Equity and the Acts of Congress to remove the said clouds upon their title and that of the New Orleans Pacific Railway Company, to all of the lands patented or selected under the said Acts of Congress, and the decisions of the Executive Department of the United States, and that, while a portion of the said
- 762 land grant is situated in the Eastern District of Louisiana and within the Territorial jurisdiction of this Honorable Court, and the balance thereof in the Western District of Louisiana, but all within the State of Louisiana, the Union Trust Company of New York is not an inhabitant or found within this District, nor is the said John B. Crooks, Everett H. Carter or Edward Lander, and your Orators are entitled if necessary to have the said defendants compelled to appear and plead, answer, or demur, by such service or by such publication as your Honors may under the law direct. But they aver that the said Crooks, Carter, and Lander are

represented in the City of New Orleans by Albert H. Leonard, Esq., their agent and attorney, who has possession and entire control of the bonds which they respectively claim to own as aforesaid, and your Orators claim the right to have process served upon them through their said Agent Albert H. Leonard. 763

They further show that the claims of the said bondholders under the said mortgages to bring a multiplicity of suits in their own name and upon maturing coupons of the said bonds and to claim that they have a lien upon the said lands mortgaged to your Orators prior to your Orators, works an irreparable injury to your Orators and authorizes in equity the issue of an injunction herein to prevent a multiplicity of suits, in such form and to such extent as your Honors may in equity determine. 764

TO THE END THEREFORE THAT YOUR ORATORS may have such relief as can only be obtained in a Court of Equity, and that a decree may be made in this cause that the said mortgage so made on behalf of the New Orleans, Baton Rouge & Vicksburg Rail Road Company by Thomas C. Bates appearing as its President before T. J. Beck, Notary Public, on the 1st of October, 1870, at New Orleans, does not embrace, cover, include, hypothecate or affect the lands patented March 3rd, 1885, by the United States to the New Orleans Pacific Railway Company under the Act of Congress of March 3rd, 1871, chapter 122 or any part thereof, or any of the lands patented to the New Orleans Pacific Railway Company since that date under the said law or selected under the said law, and creates no lien thereon nor right in or on or to the same or any part thereof; and that the said mortgage by the said New Orleans Pacific Railway Company to your Orators is the first lien upon the said lands, and that the said mortgage so made on behalf of the said New Orleans, Baton 765

- 766 Rouge & Vicksburg Rail Road Company by Calvin H. Allen, appearing as its President before the same Notary on September 4th, 1872, at New Orleans, does not embrace, cover, include, hypothecate or affect the lands patented March 3rd, 1885, by the United States to the New Orleans Pacific Railway Company under the Acts of Congress of March 3rd, 1871, chapter 122 or any part thereof or patented since that date or selected under said law, and creates no lien thereon, or right in, on or to the same or any part thereof: And that in any event the said mortgage of 1883 and 1884 by the New Orleans Pacific Railway Company is a first lien upon all of
- 767 the said lands and that an injunction issue heretn enjoining and prohibiting the said John B. Crooks, Edward Lander, Everett H. Carter and Albert H. Leonard and the bondholders whose agent and representative the said Albert H. Leonard is, from bringing any suit or suits to enforce the said alleged and pretended rights under the said mortgages of 1870 or 1872, except by proper proceeding in this cause and that the rights of parties, with respect to the mortgaged lands claimed in the premises may be finally adjudicated by proper decree; and that such further order or decree may be made and relief granted as in the premises may be just
- 768 and equitable.

MAY IT PLEASE YOUR HONORS to grant to your Orators writs of subpoena under the seal of this Honorable Court to be directed to the said John B. Crooks, of Arkansas, through Albert H. Leonard his Agent; to Edward Lander through Albert H. Leonard his Agent: to Everett H. Carter through Albert H. Leonard his Agent: and to Albert H. Leonard individually, and as agent of said unknown bondholders and to the New Orleans Pacific Railway Company of New Orleans: to the New Orleans, Baton Rouge & Vicksburg Rail Road Company of

the same place: and to the Union Trust Company of New York commanding them and each of them at a certain time and under a certain penalty to appear before this Honorable Court, and full, true, and perfect answer make to the premises (but not under oath or affirmation) and to perform or abide such further orders and decrees as this Honorable Court shall deem meet, and for an order to such defendants, as to whom it may be necessary to make such an order, for them to appear, plead and answer or demur herein by a certain day to be fixed, and 769

MAY IT PLEASE YOUR HONORS to direct that service of process and of such orders should be made on such defendants according to law. 770

And your Orators pray for all general relief.

(Signed) HOWE & PRENTISS,

Solicitors for Complainants.

(Signed) W. W. HOWE,
Of Counsel.

EXHIBIT "E" FILED WITH BILL OF COMPLAINT.

Filed March 3rd., 1890.

771

NEW ORLEANS PACIFIC RAILWAY COMPANY'S

LAND GRANT AND SINKING FUND MORT- GAGE.

THIS INDENTURE, Made this 17th day of April, 1883, between the NEW ORLEANS PACIFIC RAILWAY COMPANY, a corporation created by and existing under the Laws of the State of Louisiana, party of the first part, and hereinafter called the Railway

772 Company, and JOHN F. DILLON, of the City of New York, and HENRY M. ALEXANDER, of the City of New York, parties of the second part, hereinafter styled the Trustees, Witnesseth :

THAT WHEREAS, The said Railway Company is authorized, under the Laws of Louisiana, to build and equip a line of railway from the City of New Orleans, or from any point on the Mississippi River below the Parish of Iberville, on the west bank, or the City of Baton Rouge, on the east bank, or from Berwicks Bay, or from any other point in the State of Louisiana, to Shreveport, in the State of Louisiana, and such branches as it may desire to build.

773

AND WHEREAS, The Congress of the United States, by an act, approved March 3, 1871, entitled "An Act to Incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road and for other purposes," enacted, *inter alia*, that for the purpose of aiding in the construction of the railroad and telegraph line of the said Texas Pacific Railroad Company, there be, and is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved or otherwise disposed of by the United States, and to which a valid pre-emption or homestead claim may not have attached at the time the road is definitely fixed.

774

AND WHEREAS, Said last mentioned Act of Congress, in the twenty-second section thereof, enacted as follows :

"SEC. 22. That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the

State of Louisiana, shall have the right to connect, 775
 by the most eligible route to be selected by said
 company, with the said Texas Pacific Railroad at
 its eastern terminus, and shall have the right of
 way through the public land to the same extent
 granted hereby to the said Texas Pacific Railroad
 Company; and in aid of its construction from New
 Orleans to Baton Rouge, thence by the way of Alex-
 andria, in said State, to connect with the said
 Texas Pacific Railroad Company at its eastern
 terminus, there is hereby granted to said company,
 its successors and assigns, the same number of al-
 ternate sections of public lands per mile, in the
 State of Louisiana, as are by this act granted in the 776
 State of California to said Texas Pacific Railroad
 Company; and said lands shall be withdrawn from
 market, selected, and patents issued therefor, and
 opened for settlement and pre-emption, upon the
 same terms and in the same manner and time as is
 provided for and required from said Texas Pacific
 Railroad Company, within said State of California."

As will more fully appear by reference to the said
 Act of Congress, which is deemed to be incorporated
 herein as fully as if the same were herein set out at
 length.

AND WHEREAS, The said Congressional Land 777
 Grant was made by Congress to the said New Or-
 leans, Baton Rouge and Vicksburg Railroad Com-
 pany, its successors and assigns.

AND WHEREAS, The said New Orleans, Baton
 Rouge and Vicksburg Railroad Company has trans-
 ferred and assigned its right to the said land grant
 to the said New Orleans Pacific Railway Company,
 which said last mentioned company has accepted
 the same without, however, assuming or becoming
 liable for any of the debts, obligations, claims or

778 charges of the New Orleans, Baton Rouge and
 Vicksburg Railroad Company.

AND WHEREAS, The said New Orleans Pacific
 Railway Company has surveyed and located a line
 of road from New Orleans to Shreveport in the
 same general direction of the line or route of the
 said New Orleans, Baton Rouge and Vicksburg
 Railroad Company, by reason whereof, and of the
 said assignment, and the recognition of the same
 by the Land Department of the General Govern-
 ment, the said New Orleans Pacific Railway Com-
 pany claims to be and is entitled to the benefit of
 779 the said land grant.

AND WHEREAS, The said New Orleans Pacific
 Railway Company has, at the date hereof, con-
 structed and completed its said line of railroad.

AND WHEREAS, The said New Orleans Pacific
 Railway Company, in order to provide the means
 of payment for the said land grant, so as aforesaid
 assigned to it, and for the construction of said rail-
 road, and for other purposes, is by law authorized
 and has determined to issue bonds and to execute
 in the corporate name of the said company a mort-
 780 gage on the said lands to secure the payment of the
 said bonds, each of which bonds to be for the sum
 of one thousand dollars, payable to bearer on the
 first day of July, A. D. 1911, and in the following
 form, viz.:

UNITED STATES OF AMERICA,

STATE OF LOUISIANA.

No. \$1000.

Land Grant and Sinking Fund Bond of the New
 Orleans Pacific Railway Company, secured by a
 mortgage on the lands embraced in the Congres-

sional Land Grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company, by Act of March 3, 1871, the principal and interest payable only out of the lands patented or certified to the New Orleans Pacific Railway Company, as the assignee of said New Orleans, Baton Rouge and Vicksburg Railroad Company, or the proceeds thereof. 781

Know all men by these Presents, that the New Orleans, Pacific Railway Company, for value received, promises to pay to the bearer, or in case the bond is registered, then to the registered holder, out of the mortgaged lands, or the proceeds of the sales thereof, in the manner hereinafter stated, the sum of one thousand dollars, on the first day of July, nineteen hundred and eleven, at its agency in the City of New York, with interest thereon at the rate of six per cent. per annum, on the first days of January and July in each year. 782

This bond is one of a series of bonds of like tenor and date secured by a mortgage of even date herewith, duly executed and delivered by said New Orleans Pacific Railway Company to John F. Dillon and Henry M. Alexander, Trustees, conveying, as set forth in the said mortgage, all of the lands acquired or to be acquired by said company as assignee of the said New Orleans, Baton Rouge and Vicksburg Railroad Company, under an Act of Congress approved March 3, 1871, and is payable, principal and interest, as provided in said mortgage, only out of the said lands or the proceeds of the sales thereof. 783

This series of bonds is limited to an issue of two dollars and fifty cents per acre on the number of acres of land which shall be patented or certified to or for the New Orleans Pacific Railway Company; which company it is agreed shall not be liable for payment of either the principal or interest of this

No bonds are to be issued under this indenture 787
 before the lands in the land grant are patented or
 certified to, or for the benefit of or acquired by the
 said New Orleans Pacific Railway Company; and
 as fast as lands are thus patented or certified, or
 the title thereto acquired by the New Orleans
 Pacific Railway Company, bonds may be issued
 hereunder from time to time at a rate not exceed-
 ing two dollars and a half per acre, and all bonds
 issued and certified hereunder shall stand equally
 secured hereby, irrespective of the date of actual
 issue or negotiation. And the said Railway Com-
 pany covenants and agrees with the said Trustees,
 for the benefit of whoever shall become holders of 788
 bonds issued hereunder, that it will not issue bonds
 at any greater rate than at the rate of two dollars
 and a half per acre for lands actually patented or
 certified, or acquired by it at or before the time
 when said bonds are issued.

AND WHEREAS, This Indenture and the bonds
 secured thereby have been authorized by the Board
 of Directors of the party of the first part:

NOW, THEREFORE, THIS INDENTURE WITNESSETH:
 That the said NEW ORLEANS PACIFIC RAILWAY
 COMPANY, in consideration of the premises and of 789
 one dollar to it in hand paid by the parties of the
 second part, receipt whereof is hereby acknowl-
 edged, in order to secure, in the manner herein
 provided, the payment in the manner herein
 provided, of the sums of money mentioned in the
 said bonds, and interest thereon, issued or to be
 issued, as in this indenture set forth, has granted,
 bargained, sold, assigned, conveyed and confirmed,
 and by these presents doth grant, bargain, sell,
 convey, assign and confirm unto the said parties of
 the second part, as trustees, as joint tenants and
 not as tenants in common, and to their survivor or

790 successor, or successors and their heirs and assigns forever, all and singular the said several sections of land, and each and every part thereof, granted as aforesaid to the said New Orleans, Baton Rouge and Vicksburg Railroad Company, by the said Act of Congress, approved March 3, 1871, estimated to contain from one million five hundred thousand to two million acres of land, and also all the estate, right, title, interest, claim and demand whatsoever, at law or in equity, of, in or to the same, or any part or parcel thereof, which the said New Orleans Pacific Railway Company now has, holds, owns or is entitled to, or hereafter may or shall
 791 acquire, hold, own or be or become entitled to by force or virtue of the said Act of Congress, saying, excepting and reserving, however, from this indenture, all parts and parcels of the said lands which are or shall be included in the railroad of the said New Orleans Pacific Railway Company, or used for the construction or operation thereof, or for the tracks, yards, depot grounds, not exceeding twenty acres at any one station, buildings or erections thereof.

To HAVE AND TO HOLD, all and singular the premises hereby granted, or intended to be, with
 792 all the appurtenances thereunto belonging, unto the said parties of the second part, as joint tenants, and their successors and survivor, and their and his heirs and assigns, as Trustees, for the uses and purposes and upon the trusts and agreements in this indenture set forth and declared, and subject to the provisions and requirements of the aforementioned Act of Congress. It being well understood that each and all of said lands are, by this instrument intended to be, and are mortgaged, hypothecated and affected in favor of the said Trustees, and of each and every holder of said bonds or any of them for the securing of each and

every obligation created and evidenced by said 793
bonds.

The said bonds secured hereby do not, nor does this indenture impose, any liability *in personam* on the party of the first part or its successor or their stockholders, and is no lien or charge on any property except the property herein and hereby mortgaged.

The aforesaid mortgage and conveyance is executed and delivered upon the TRUSTS, TERMS, CONDITIONS AND AGREEMENTS following; that is to say:

That all of the lands herein conveyed and mort- 794
gaged, and intended to be, shall be under the sole and exclusive management and control of the said party of the first part, or its successor by merger, consolidation, purchase or otherwise, which shall have full power and authority to make and sign contracts for the sale of said lands, at such price and on such credit or terms of payment, taking the notes or obligations of the purchasers in the name of the Trustees, and such other conditions as may be agreed upon by the said party of the first part, or its said successor, and said Trustees for the time being, and as shall seem to them best calculated to secure the payment in full of the said bonds issued as hereinbefore provided, and in the manner 795
herein, and in the said bonds provided, until entry or foreclosure by the Trustees, as hereinafter provided; but no title deed for any of the lands contracted to be sold by said party of the first part, or its successor, as aforesaid, shall be given, or the lien of this indenture released, until the whole purchase money of said lands shall be paid over to the said Trustees in cash, or in the bonds secured hereby. To this end it is agreed that the said first party hereto, or its successor, and the said Trustees, or their survivor or successors, shall cause all of such lands as shall, from time to time,

796 be patented or certified by the United States to, or acquired by the company, and become subject to sale, to be carefully appraised, at their fair actual selling value, by two disinterested persons, one to be selected by the Railway Company and the other by the Trustees, and if these two cannot agree they shall select a third appraiser, the decision and action of a majority of whom shall stand as the appraisement until it is altered as hereinafter provided.

797 The appraisers shall affix to each section or subdivision thereof such price as, in their judgment, shall be the fair actual selling value, and said lands shall be and remain at all times thereafter open to sale to any person who may desire to purchase and pay therefor. Such appraisements may be changed from time to time, and are at all times subject to revision and alteration by the said parties, in the manner aforesaid.

798 Bondholders, to the amount of one-fourth of the outstanding bonds, may at any time make a written demand upon the parties hereto for a reappraisement, by disinterested persons, of all or any part of said lands, in which case said bondholders may select one person and the parties hereto another, and, if necessary, the two a third, who may reappraise the said lands, or any part thereof, which appraisement shall stand for one year at least, unless a like reappraisement shall be made. After a year, the parties hereto may cause the said lands to be again appraised, subject to having their action in this regard controlled by a reappraisement, in the manner aforesaid, by other persons selected by the bondholders and parties hereto, as aforesaid.

No lands covered by the right of way of the road, or necessary for depot grounds, or other purposes connected with the construction or operation of the railroad, not exceeding twenty acres at any one

station as aforesaid, shall be appraised or sold, 799
the same not being covered by this indenture.

The said parties hereto may authorize a sale, at a reduced price, to persons intending to purchase for actual settlement and certification a large quantity of lands, or for other special reasons, which to the said parties hereto make it appear to the advantage of all parties concerned that such sale shall be made, but only on condition that the President of the Railway Company and the Trustees shall file with the Secretary of the Railway Company, the resolution of the Company, and also, a written statement, under oath, of the reasons for such sale at reduced price, and that the same is 800
made in good faith, and because, in their judgment, it is for the best interests of all concerned that it should be made.

The purchaser of any of the lands embraced in this indenture shall be at liberty to pay for the same in the bonds secured hereby, at par and accrued interest; and when any tract or parcel of the said lands shall have been purchased and paid for, as aforesaid, or in cash, and the proceeds of such payment received by the Trustees, the lands shall be conveyed by the said Trustees, or their survivor or successor or successors, to the purchaser, and shall by such conveyance stand absolutely and forever released from any and all lien 801
or incumbrance for or on account of said bonds or this indenture.

It is expressly agreed by the holder of each bond secured hereby, that the interest on this bond, if demanded by the holder in cash, shall be and is payable only out of the net proceeds of the cash sales of the mortgaged lands, and such interest shall be deemed fully paid on the payment in cash of such proportion of six per cent. per annum as the *pro rata* distribution of the said net proceeds for the next preceding six months will permit; but

802 if the holder of this bond shall elect to use the same in payment for any of the lands mortgaged, it shall, in that event, be receivable at the par of principal and accrued interest, at the rate of six per cent. per annum (without compounding interest), in payment for said lands. Lands must be taken in congressional subdivisions, and any fractional difference between the purchase price of the lands purchased and the amount of the principal of the bonds and accrued interest thereon shall be paid by the purchaser in money.

The consideration money in any sales of land embraced in this indenture may be paid either in
803 whole or in part by delivering to said Trustees to be cancelled, one or more of said bonds which may have been issued as aforesaid, at their par value and interest accrued; and two or more purchasers of said lands may unite and pay a part or all of the aggregate amount of their purchases by delivering to said Trustees said bonds to the amount of such payment, to be cancelled.

In case the sum of such purchase money shall not amount to the value of the bond or bonds with their accrued interest so surrendered, then the Land Commissioner of the party of the first part shall in their discretion have authority to issue a
804 certificate representing the amount in excess due said purchaser, such certificate to be receivable for land only, and without interest.

It shall be the duty of the Trustees to cancel all bonds received in payment for lands, by defacing the seal of the corporation and perforating the signatures of the president and treasurer.

The proceeds of all sales of land, when received in cash, are to be applied by the Trustees as follows:

First.—To the payment of the necessary expenses of the trust, and the procuring, surveying, appraising, advertising and selling and conveying of the lands as herein provided.

Second.—The payment of taxes.

805

Third.—To the payment of interest upon the said bonds. If it is found, at the expiration of an interest period, that the net proceeds from the sales of land are not sufficient to pay the six (6) months' interest then due, a *pro rata* dividend may be declared by the Trustees upon such bonds as may then be outstanding, and the dividend so declared shall be advertised for thirty days in one or more daily newspapers in the cities of New York and New Orleans, and its acceptance by the bondholder shall be deemed a payment in full of all interest due, and be so endorsed upon the bond.

If the bondholder does not accept the same, and elects to use the bond, with its accrued interest, in the payment of lands, then the amount of such cash dividend shall be carried to and become part of the sinking fund. 806

Fourth.—Any residue shall be carried to and shall constitute a sinking fund.

All money coming into the sinking fund shall, from time to time, be used by the Trustees in the purchase of the bonds secured hereby in the market, at the lowest price at which they can be procured, not exceeding the par thereof.

It is expressly agreed between the parties hereto and all holders of bonds secured hereby, that the bonds secured hereby, including the overdue interest thereon, shall be at all times receivable as aforesaid herein provided, in payment for the lands embraced herein at the appraised price. 807

If default shall be made in the payment, as herein provided, of interest on any of the said bonds, and such default shall continue for the space of two years after demand, in writing, at the place of payment, then the Trustees *may*, and on being requested, in writing, by the holders of at least one-fourth ($\frac{1}{4}$) of the outstanding bonds, *shall*, enter into and take possession of any of the

808 lands herein contained, and foreclose this mortgage, by a sale at public auction of so many of the said lands as may be necessary to discharge all arrears of interest, and apply the proceeds, after deducting the costs, charges and expenses, to the payment of such arrears of interest. If such default shall continue for the space of *three* years from the time of such demand and refusal, the principal of all of the said bonds then outstanding shall, unless waived as hereinafter provided, become due and payable, and the Trustees may, and on being requested by the holders of one-fourth of the said bonds then outstanding, shall enter into
809 and take possession of all lands hereby mortgaged, and foreclose this mortgage, by selling the said lands at public auction, in the City of New York or New Orleans, as they may elect, or so many of said lands as may be necessary, first giving at least two months' previous notice of the time and place of such sale, in at least one newspaper published in the City of New York, and one in the City of New Orleans, briefly describing the lands by general description and the time and place of sale; and they shall apply the proceeds of such sale, after deducting costs, charges and expenses of the trust, to the payment of all of the said bonds then
810 outstanding and interest accrued thereon, rendering the overplus, if any, to the party of the first part, or its successors or assigns. Upon such sale the Trustees are authorized to execute and deliver conveyances, which shall convey to the purchaser an irredeemable title to the said lands, free from any right or equity of the said Railway Company, its successors or assigns, to redeem the same. No such sale shall be made if at any time prior to the sale all arrears of interest shall be paid, in which event the Trustees shall discontinue the proceedings to sell, and restore the said lands to the party of the first part, to be held subject to the terms

and trusts of this Indenture, in the same manner 811
 as if no entry or foreclosure proceedings had been
 commenced. And in like manner in case the prin-
 cipal of any of the bonds secured hereby shall not
 be paid in full in cash when the same shall become
 due and payable, then the Trustees hereunder *may*,
 and on being requested, in writing, by the holders
 of at least one-fourth of the bonds hereby secured
 and outstanding, *shall* enter into and upon and
 take possession of all the lands hereby mortgaged,
 and foreclose this mortgage, by selling the said
 lands or such portion of them as may be necessary,
 at public auction, in the City of New York or New
 Orleans, as they may elect, first giving at least two 812
 months' previous notice of the time and place of
 such sale, in at least one newspaper published in
 the City of New York, and one in the City of New
 Orleans, briefly describing the lands by general
 description, and the time and place of sale; and
 they shall apply the proceeds of such sale, after
 deducting costs, charges and expenses of the trust,
 to the payment of all of the said bonds then out-
 standing and interest accrued thereon, rendering
 the overplus, if any, to the party of the first part,
 or its successors or assigns. Upon such sale the
 Trustees are authorized to execute and deliver
 conveyances, which shall convey to the purchaser
 an irredeemable title to the said lands, free from 813
 any right or equity of the said Railway Company,
 its successors assigns, to redeem the same.

The proceedings above contemplated for a sale
 as aforesaid, by virtue of the power herein given
 as aforesaid, are *cumulative*, and do not preclude
 a foreclosure in judicial tribunals.

A majority of the outstanding bonds in number
 and value may at any time, in writing, waive any
 default in respect of either interest or principal,
 and thereby prevent a foreclosure for the time being
 by the Trustees, in either of the modes herein pro-

814 vided for; and such majority may waive, in like manner, any subsequent default under this Instrument at any time before a sale is made hereunder or decree of foreclosure is entered.

Whenever all the bonds secured hereby, with interest thereon, and all the expenses incurred by the Trustees hereunder, shall have been fully paid, the Trustees shall reconvey the said property, not before that time sold or disposed of, to the said party of the first part, its successors or assigns.

815 In case the said Trustees shall at any time have any trust moneys on hand, derived from a sale of lands hereby conveyed, which will not be required to meet any immediate liability to which the said moneys are by these presents devoted, the said moneys may be deposited on interest with some bank or trust company in the City of New York, subject to be drawn by check signed by the Trustees, or such one of them as they may designate.

All of the books of the Railway Company, and of the Trustees, relating to the lands or to this trust, shall be open to the inspection of the Company and the said Trustees and the bondholders secured hereby.

816 The said Trustees shall not certify or deliver bonds hereunder in excess of or at a greater rate than at the rate of two dollars and a half (\$2.50) per acre for lands actually patented or certified by the United States, under the land-grant aforesaid, either to the New Orleans Pacific Railway Company or for its benefit, or which shall be acquired by that Company, so as to fall within the security of this Indenture.

Meetings of the holders of the said bonds hereby secured for the determination of, or action upon, any of the questions upon which, by any of the provisions hereof, the majority in interest of said bondholders may have the right to decide, may be called

by the then Trustees, or in such other mode as may 817
 be, from time to time, fixed by such majority in
 interest of the holders of said bonds in respect to
 such meetings, and until said bondholders shall so
 act, such powers may be exercised by the said Trustees
 in this trust, and all acts or resolutions of the
 said bondholders affecting the rights or remedies,
 or for the benefit of the said bondholders, or the
 duties of the Trustees, or the interest of the trust
 hereby created, shall be authenticated by the signatures
 of all the persons assenting thereto, as well
 as by a record of the proceedings to be kept of
 any such meetings.

But it is understood, and hereby expressly de- 818
 clared and agreed, that no act or resolution of any
 meeting of bondholders, or of the Trustees, nor any
 act or election of, or instrument executed by, a
 majority in interest of all said bonds, shall impair,
 control or affect the rights, interests or remedies,
 legal or equitable, of any non-assenting bondholder,
 except in the particulars, and to the extent to which
 the same is expressly made controlling by the provisions
 contained herein.

The said party of the first part does hereby covenant
 and agree to, and with the said party of the
 second part, and its successor or successors in this
 trust, on behalf, and for the benefit of, the said 819
 bondholders intended to be secured hereby, that it
 will, from time to time, and at all times hereafter,
 upon reasonable request, make, do, execute,
 acknowledge and deliver all such *further acts,*
deeds, conveyances and assurances for the better
 assuring unto the said Trustees and their successor
 or successors in the trust hereby created, upon
 the trusts and for the purposes herein expressed or
 intended, all and singular, the premises and lands
 herein conveyed, or intended or covenanted so
 to be.

Said Railway Company, the said party of the

820 first part, for itself and all other persons hereafter claiming through or under it, and who may, at any time hereafter, become holders of liens junior to that of these presents, hereby *expressly waives and releases all right to have the assets* comprised in the security intended to be created by these presents, *marshalled upon any foreclosure* or other enforcement thereof, and it is expressly hereby agreed and declared, that the Trustees herein, and any court in which foreclosure of this mortgage or administration of the trusts hereby created is sought, shall have the right to sell the entire property of every description comprised in, or subject to, the trusts of these presents as a whole in one single lot, if it shall in its discretion think fit. And a majority in interest of said bonds may, by instrument in writing, direct the Trustees or petition the said court to sell the said property in such manner.

821 Said Railway Company, the said party of the first part, for itself, its successors and assigns, and so as to bind all persons who may claim through or under it, as assigns, junior encumbrances, lien holders, or otherwise, doth hereby *irrevocably waive the benefit or advantage of any or all valuation, stay, appraisalment, redemption or extension laws*, and of all laws requiring mortgages, liens, 822 hypothecations, or other securities for money to be foreclosed by action therefor, now existing or which may hereafter exist, in any State wherein the property to be sold hereunder, or any part thereof, may, at the time of sale be situated, or where the said sale may take place, which but for this provision herein might prevent or postpone the sale of said premises, property, rights and interests to the purchaser under the powers and upon compliance with the provisions herein provided, and said party of the first part does hereby covenant with the said party of the second part, the said Trustees, or their successor or successors, in

the trust hereby created, that it will not, in any 823
 manner, *set up or seek, or take the benefit or advantage of any such valuation, stay, appraisement, redemption or extension law.*

And it is further mutually agreed, by and between the parties hereto, and is hereby declared to be a condition upon which the said parties of the second part and their successor or successors in the trust hereby created, have assented to these presents and accepted this trust, that the *said Trustees and their successors in this trust shall not in any manner be held responsible for the acts or default of clerks, cashiers, or other persons employed by them, unless guilty of culpable negligence in the* 824
 selection of such employees, nor shall the Trustees be answerable except for their own willful default; nor shall one Trustee be answerable for money received, or acts done or omitted by his co-Trustee; nor shall either or any Trustee be liable for the solvency of banks or trust companies selected for the deposit of moneys received under this trust, nor for errors of judgment, nor mistakes of law or fact, or for anything short of his own gross negligence or willful misfeasance.

It is expressly agreed that the Trustees may employ the necessary clerical, legal and other assistance to enable them to execute this trust, and that 825
 the expense thereof and all other reasonable or necessary expenses and disbursements, as well as a reasonable commission or compensation to themselves, not exceeding, without a special allowance by a court of competent jurisdiction, the maximum now allowed by the laws of the State of New York to executors shall be paid or retained out of the proceeds of the sales of land or in the bonds secured hereby at their market value. Bonds and accrued interest received in payment of lands are for the purposes of estimating the commissions or compensation of the Trustees, to be considered the

826 same as if the payment had been made in money. The Railway Company shall pass upon and audit the accounts of the Trustees.

And it is agreed and hereby provided, that the *said Trustees* and their successor or successors in this trust *may be removed, and a successor may be appointed*, at any time, by any court of competent jurisdiction, upon application of a majority in interest of the holders of the then outstanding bonds hereby secured.

827 And it is also agreed and hereby provided, that *a majority in value of the outstanding bondholders secured hereby* may, upon their own motion at any time, with or without cause, by an instrument or instruments in writing, under seal, signed by them to that effect, and without calling a meeting of the bondholders for that purpose, *remove the said Trustees* and any successor to the trust hereby created, and in writing under seal appoint one or more Trustees herein, whether the last Trustee shall have been appointed by a court of competent jurisdiction or otherwise, anything herein to the contrary notwithstanding. In case of such removal and appointment of Trustees by the bondholders, the writing shall be signed by each bondholder or his or her agent, stating the place of residence of
828 such holder and the serial numbers and the amounts of the bonds, and in every case the affidavit of the holder shall accompany the instruments of removal and appointment, to the effect that the party signing such instruments is the owner or holder of the bonds for which he or she signs, and stating the serial number and the amount in value of each bond and the owner or holder's place of residence.

It is also hereby expressly agreed and provided, that in case of the appointment, in any of the modes herein provided, of a successor or successors, to the trust hereby created, *such successor shall be,*

without any further act or conveyance being necessary, invested with all and singular the powers and duties hereby conferred and imposed upon the said Trustees herein and hereby designated, so long as he or they shall remain such successor Trustee. 829

No bonds shall be certified by the Trustees hereunder, except upon the receipt by them, or their successors or survivor, of a certified copy of a resolution of the party of the first part, or of its successor, stating how many acres of land have been certified or patented by the United States under said land grant to or for the benefit of the Railway Company, and also stating that the title thereto has been acquired by or has vested in said company, and the number of bonds to which the said company is, at the time, entitled under this Indenture, which said resolution thus certified shall be sufficient authority and full protection to the Trustees to make the said certificate endorsed on the bonds, and to certify and deliver bonds pursuant to such resolution, and no duty is imposed upon the Trustees to look behind such resolution before certifying bonds and delivering the same. 830

The said Trustees, each for himself, hereby promises and agrees that in no case will they deliver to said Railway Company, the said party of the first part, or to any other person or persons, any of the bonds secured hereby, except in conformity with the aforesaid provision of this instrument. 831

The said Trustees, or any successor to this trust, shall have the right, and they are hereby empowered and authorized, on any sale under or foreclosure of this mortgage or deed of trust, to buy in the mortgaged property at a price not exceeding the amount of the Mortgage Bonds secured hereby, and to hold and possess the property so purchased, and to control, manage, use and operate the same, and receive the incomes, rents, issues and profits

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832 thereof, upon the trusts and subject to the covenants and the conditions of this Indenture.

And in case of any foreclosure sale, or of any sale made under any of the provisions of this deed of trust, *the purchaser or purchasers thereat shall be entitled, in making settlement for, and payment of, the purchase money therefor, to deliver to the then Trustees, toward the payment of such purchase money, any of the said bonds secured hereby, and held by such purchaser or purchasers counting such bonds for such purpose at a sum not exceeding that which shall be payable out of the net proceeds of such sale to the holder or holders*
 833 *of such bonds, as his or their share and proportion in that character of such net proceeds of sale, after allowing for the proportion of payment which may be required in cash for any indebtedness to this trust, and for the costs and expenses of the sale, and which proportion of cash payment shall be determined and announced by the then Trustees previous to any such sale; and if such proportionate sum shall be less than the amount of such bonds, to make such settlement by receipting thereon for the amount to be credited thereupon.*

For the purpose of carrying out the trusts and objects of these presents, the said Trustees, or their
 834 *successor or successors to this trust, may, whenever it shall be deemed expedient, call meetings of the holders of said bonds secured hereby, in some convenient place in the City of New York, upon such notice, and under such regulations, as they may deem proper, but no decision of any majority in amount at any such meetings shall be of any effect, unless the same shall be duly authenticated by an instrument in writing, signed by the persons holding such majority, and proved as herein provided.*

The execution of any instrument or affidavit required by any provision of these presents to be executed by a majority in amount of the holders of

the said bonds hereby secured, then outstanding, shall be deemed sufficiently proved if their respective execution of such instrument (which may be executed in any number or parts or duplicates), and of any procuration or power of attorney under which any signer may claim to act, and their holding of the said bonds respectively stated to be held by them, such bonds being identified by their serial numbers and amounts, as aforesaid, shall be certified by a Notary Public, or other person authorized to take acknowledgments of deeds, with their seals of office affixed, or any State or Country, and any certificate and seal purporting to be a notarial certificate and seal, or certificate and seal of any other officer authorized to take acknowledgments of any deeds, shall be sufficient evidence of the official character of the persons making such certificates. 835 836

The words "Trustee," "said Trustee," and "party of the second part," as used in this instrument, shall be construed to mean the Trustee or Trustees for the time being of this deed of trust, and whenever a vacancy shall exist, or any change of Trustees shall be made, to mean the surviving or continuing, or successor Trustee. And any surviving, continuing or successor Trustee herein shall be possessed of, and be fully competent to exercise, all the powers and duties granted and conferred by these presents to the said Trustees named in this instrument as the party of the second part. 837

Any Trustee may at any time *resign* his place as Trustee by a proper instrument to that effect, which resignation shall be accepted by the party of the first part or its successor, whereupon the place of such resigning Trustee shall become and be vacant.

In case of a vacancy by death, resignation, or otherwise, at any time, in the number of Trustees, the remaining Trustee shall, while the vacancy exists, have all the rights and powers, and shall

838 discharge all the duties devolving on said Trustees; but, as soon as it may conveniently be done, such vacancy shall be filled by the nomination by the remaining Trustee of some proper person to fill such vacancy, which nomination shall be submitted to the Board of Directors of the said company, and, if approved by them, the person so nominated and approved shall immediately become a Trustee under this instrument. If such nomination is not approved, another person shall be nominated by said remaining Trustee, and, in like manner, submitted for approval, and so on until the nominations shall have been approved; but if three successive nominations shall be made and no one of them be approved
839 by said Board, said vacancy shall be filled by a committee of three persons selected—one by the remaining Trustee, one by the Board of Directors, and the third by the two thus selected; and the person selected Trustee by the majority of the committee shall be Trustee under this instrument. Notwithstanding these special provisions it shall be competent for a majority of the outstanding bondholders secured hereby to appoint a Trustee or Trustees to fill such vacancy, or apply to a court of competent jurisdiction for such appointment.

840 It is expressly agreed that whereas, the New Orleans Pacific Railway Company has merged or consolidated with or become part of the Texas and Pacific Railway Company, that the last named Company or its successor may, if the said two companies shall at any time so agree, take, for the purposes of this Indenture, the place of the New Orleans Pacific Railway Company, and perform all of the acts and things to be performed hereunder by the New Orleans Pacific Railway Company as fully as if the Texas and Pacific Railway Company or its successor had been expressly named in this Indenture, wherever the name of the New Orleans

Pacific Railway Company, or the words party of 841
the first part, occur therein.

It is agreed that the officers of the Land Department of the Railway Company, or of the Texas and Pacific Railway Company, will act for the party of the first part in making contracts for the sale of lands embraced herein at the appraised price, and that the trust hereby created shall only be charged by the Railway Company with the actual cash expenditures in respect of such lands, including the expense of procuring the same to be patented, the surveying, advertising, selling and conveying thereof, and including also necessary expenses of the Land Department pertaining thereto. 842

It is expressly agreed between the parties hereto, and with the holders of the bonds secured hereby, that the Trustees may at all times apply to any Circuit Court of the United States having jurisdiction, or to the Supreme Court of the State of New York, for advice and direction as to the performance of their duties under, or for the construction or interpretation of any provision of this Indenture, and that process served upon the New Orleans Pacific Railway Company, or the Texas and Pacific Railway Company, or its successor as aforesaid, or the president, secretary, or any director of said company, shall be all the service required to give 843
such court full jurisdiction, and its orders and decrees shall be binding upon all the parties hereto and all bondholders secured hereby, and fully protect the Trustees for all acts done under or in pursuance of such orders and decrees.

It is expressly agreed that if, on the 1st day of May in any given year, during the continuance of this trust, the moneys received from the sale of lands shall not be sufficient to pay the taxes and assessments on said lands due for the preceding year or years, and to pay the governmental charges and the actual cash expenses of the trust, then the

844 said Trustees are hereby authorized and empowered in their discretion (anything in these presents to the contrary notwithstanding) to advertise for sale, and sell at public auction to the highest bidder, for cash, enough of said lands to raise the sum required to pay the said taxes, assessments and governmental charges and actual cash expenditures of the trust, and the conveyances by the Trustees to the purchasers shall convey an absolute and irredeemable title to the lands thus sold.

Sales made under the foregoing power, shall be made either in the City of New Orleans or New York, as the Trustees may elect, and at such place
845 therein as the Trustees may select.

Notice of such sale, and of the time and place thereof, shall be given by the said Trustees for four weeks in some newspaper of general circulation, published in the City of New York and New Orleans. Such sales may be made whenever and as often as the contingency above specified shall happen.

If at any time the said Trustees shall not have sufficient moneys in hand, applicable to that purpose, to pay the taxes, assessments and other governmental charges upon the lands hereby granted or intended to be, the said Trustees may, and are
846 hereby authorized and empowered, in their discretion, to sell and convey at *private* sale, instead of public sale, and at such price or prices as they may deem expedient, without regard to the appraised value thereof, so many of said lands as shall be necessary to produce the sum required to pay such taxes, assessments and charges, and the deed of the said Trustees shall convey a good title to the land so sold, free of the lien of this indenture.

The purchasers are not in any case charged with the duty of seeing to any application of moneys by the Trustees.

It is understood and agreed, that this instrument

is intended to have, and shall have, full operation 847
and effect as a lawful mortgage of the above de-
scribed property, in the State of Louisiana.

It is understood and declared that the Trustees
or their successors shall have full power to convey
said lands according to the terms of this instru-
ment and their conveyance shall vest in the pur-
chaser a full and absolute title without the joinder
therein of the New Orleans Pacific Railway Com-
pany or the Texas Pacific Railway Company.

IN WITNESS WHEREOF, The said party of the first
part has hereunto affixed its corporate seal, and
has caused these presents to be attested by its 848
President and Secretary, at New Orleans, this 17th
day of April, one thousand eight hundred and
eighty-three.

By order of the Board of Directors.

(Signed) E. B. WHEELOCK
President.

[SEAL.]

Attest:

(Signed) WM. S. NICKOLSON
Secretary.

Signed, sealed and delivered }
in the presence of }
(Sig) B. BANNERS
(") F. J. KEANE

849

The Trustees named in the foregoing deed accept
the trust therein mentioned, and agree to perform
the same.

Trustee

STATE OF LOUISIANA, }
Parish of Orleans, }
City of New Orleans, }

BE IT REMEMBERED, that on the seventeenth day
of April, A. D. one thousand eight hundred and
eighty-three before me, the undersigned, a Notary

850 Public in and for the Parish of Orleans, State of Louisiana, duly commissioned and authorized to take the acknowledgment and proof of the execution of deeds and other instruments of writing, to be recorded or used in the State of Louisiana, as also to administer oaths, affirmations, etc., and to take and certify depositions, personally appeared the above named Edward B. Wheelock, the President, and William S. Nickolson, the Secretary, of the New Orleans Pacific Railway Company, and executed the above instrument of writing in my presence, and that of the two witnesses whose names are thereto subscribed as such; and there-
 851 upon said Edward B. Wheelock, as President, and said William S. Nickolson, as Secretary, of said New Orleans Pacific Railway Company, acknowledged that they had signed and executed the same as their act and deed, for the consideration, uses and purposes there mentioned, in their said respective capacities, and as the act and deed of said New Orleans Pacific Railway Company.

And said Messrs. Wheelock and Nickolson, being by me first duly sworn, did, each for himself depose and say, that the said E. B. Wheelock is the President, and said W. S. Nickolson is the Secretary, of the New Orleans Pacific Railway Com-
 852 pan.; that in such capacities they signed and executed the above instrument by order of the Board of Directors, as and for the act and deed of said New Orleans Pacific Railway Company; that the seal thereto affixed is the corporate seal of said company, and that it was affixed by order of the Board of Directors.

IN TESTIMONY WHEREOF, I have here-
 unto set my hand and affixed my seal
 of office, as Notary Public aforesaid, at
 my office, in said City of New Orleans,
 on the day and date above written.

[SEAL.]

(Sig) SAML. FLOWER
 Notary Public.

STATE OF LOUISIANA, }
 City of New Orleans. }

853

Personally appeared before the undersigned, a duly appointed and qualified Commissioner of the State of _____, in and for the City and State aforesaid, the above named Edward B. Wheelock, the President, and Edward L. Ranlett, the Secretary, of the New Orleans Pacific Railway Company, and acknowledged in due form of law the foregoing indenture to be their act and deed in their said several capacities, and as and for the act and deed of the New Orleans Pacific Railway Company, and desired the same to be recorded as such. And said E. L. Ranlett, being by me first 854
 duly sworn, did depose and say, that he was personally present and did see the common or corporate seal of the above named New Orleans Pacific Railway Company affixed to the foregoing indenture; that the seal so affixed is the common or corporate seal of said corporation, that the above named Edward B. Wheelock is the President of said corporation, and did sign the said indenture as such in the presence of deponent; that this deponent is the Secretary of said corporation, and that the name of this deponent, within signed in attestation of the due execution of said indenture, is of this deponent's own handwriting, and 855
 that said indenture was signed by deponent as such Secretary, and by said E. B. Wheelock, as President, of the New Orleans Pacific Railway Company, under authority in them vested by the Board of Directors of said corporation.

Secretary.

IN WITNESS WHEREOF, I have hereunto set my hand, and affixed my official seal, as a Commissioner of

[SEAL.]

_____, at New Orleans, Louisiana,
 this _____ day of _____
 in the year one thousand eight hundred and eighty-one (1881).

Commissioner,

856 STATE OF LOUISIANA }
 Parish of Avoyelles }

I do hereby certify the above and foregoing to have been duly recorded in Mortgage Book 30 folio 1769 *et seq.*

Given under my hand & seal of Office
 at Marksville, Parish of Avoyelles,
 May 8th, A. D. 1883.

(Signed) J. A. MARROW
 dy Clerk.

[SEAL.]

857 EXHIBIT "F," FILED WITH BILL OF COMPLAINT.

Filed March 3rd, 1890.

NEW ORLEANS PACIFIC RAILWAY
 COMPANY'S
 SUPPLEMENTAL LAND GRANT AND SINK-
 ING FUND MORTGAGE

TO

JOHN F. DILLON AND HENRY M. ALEX-
 ANDER, TRUSTEES.

858 THIS INDENTURE, made this fifth day of January, 1884, between the NEW ORLEANS PACIFIC RAILWAY COMPANY, a corporation of Louisiana, party of the first part, and hereinafter called the Railway Company, and JOHN F. DILLON, of the City of New York, and HENRY M. ALEXANDER, of said city, parties of the second part, and hereinafter styled the Trustees, witnesseth: that,

WHEREAS, the said railway company heretofore executed its Land Grand and Sinking Fund Mortgage, dated the 17th day of April, 1883, which has been duly recorded in the several counties or parishes in the State of Louisiana, where the lands

therein conveyed are situate, and which mortgage, 859
 hereinafter called the original mortgage, is hereby
 referred to and made part hereof as fully as if the
 same were incorporated herein at length;

AND WHEREAS, the said New Orleans Pacific
 Railway Company has now fully completed its line
 of road from New Orleans via Baton Rouge and
 Alexandria to a connection with the Texas Pacific
 Railway at Shreveport;

AND WHEREAS, the President of the United
 States heretofore appointed Thomas Hazard a
 Commissioner to examine the completed portions 860
 of the road of said railway company;

AND WHEREAS, the said Commissioner, by his
 report to the President of the United States, bear-
 ing date on or about the 26th day of October, 1881,
 reported that he had examined the following por-
 tion of the completed road of the said railway
 company, to wit: extending from the west bank of
 the Mississippi River, opposite Thalia street, New
 Orleans, Louisiana, in a northwesterly direction,
 near said river, sixty miles, to near the town of
 Donaldsonville, in Township 11 south, range 15
 east; also from Bayou Lamourie, in township 2 861
 north, range 1 east, to a point in township 4 north,
 range 2 west, a distance of twenty miles; also from
 the junction of said railway with the Texas and
 Pacific Railway, in Shreveport, Louisiana, south-
 wardly to township 10 north, range 12 west, a dis-
 tance of fifty miles;

AND WHEREAS, the said President afterwards
 appointed the said Thomas Hazard Commissioner
 to examine other portions of the completed road
 of the said railway company, who made a second
 report to the President of the United States, bear-
 ing date on or about the fifteenth day of November,

- 862 1882, relating to such portions of the said railway as were not examined and reported on in said first report of the 26th of October, 1881, amounting to one hundred and ninety-eight miles, lying between New Orleans and Shreveport;

AND WHEREAS, the said Commissioner reported to the President of the United States that said portions, three hundred and twenty-eight miles in all, were constructed in substantial compliance with law and the instructions of the Department of the Interior;

- 863 AND WHEREAS, the Secretary of the Interior reported to the President of the United States that in view of the facts stated in his said report, he regarded the New Orleans Pacific Railway Company as the lawful assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company, and entitled to the lands granted by the 22d section of the Act of Congress of March 3d, 1871, entitled "An Act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," and to the patents therefor in so far as it has earned or hereafter may earn the same under the said Act of Congress, with the exception next below herein named, and recommended therein to the President of the United States that he accept said three hundred and twenty-eight miles of the said road, less and exclusive of the sixty-eight miles of the line of said New Orleans, Baton Rouge and Vicksburg road, extending from New Orleans to White Castle, between New Orleans and Shreveport, to which sixty-eight miles the New Orleans Pacific Railway Company has withdrawn its claim and right to receive lands under the 22d section of said Act of March 3d, 1871, and recommended to the President of the United States that patents for such
- 864

lands as may have been earned by the construction, as aforesaid, be issued to the New Orleans Pacific Railway Company, exclusive nevertheless of lands along said sixty-eight miles, on compliance by the said railway company with the law and regulations in such case made and provided; such patents to be subject to rights acquired by any person or corporation prior to said Act of March 3d, 1871; 865

AND WHEREAS, the President of the United States, on or about the sixteenth day of March, 1883, approved the said recommendations of the Secretary of the Interior and endorsed such approval on the said recommendations, all of which will appear more fully and at length by the records and files of the Interior Department; and 866

WHEREAS, by virtue of the premises, the said New Orleans Pacific Railway Company's right to the said lands embraced in the land grant is now completed;

AND WHEREAS, some considerable time may elapse before selections of lands can be completed, and patents by the United States can be issued to the railway company for the said lands in regular course; 867

AND WHEREAS, it is for the interest of the New Orleans Pacific Railway Company not to await the formal issue of patents before issuing the bonds provided for in said original indenture of mortgage;

AND WHEREAS, the said original indenture of mortgage provides in several places therein that no bonds are to be issued by the company or certified by the Trustees thereunder before the lands in the land grant are patented or certified by the United

868 States to or for the benefit of or acquired by the said New Orleans Pacific Railway Company, and only as fast as the lands are patented or certified to, or the title thereto acquired by the said company;

AND WHEREAS, no bonds have yet been issued, certified or negotiated under the said original mortgage;

869 AND WHEREAS, it is deemed expedient for the reasons aforesaid to change and modify the terms of the said original indenture of mortgage as herein provided, so as to allow said bonds to be issued and certified at once upon the execution hereof, in advance of the issue of patents or certificates by the United States to the New Orleans Pacific Railway Company; the issue and certification of the said bonds to be at a rate of not exceeding two dollars and a half per acre for the quantity of lands which it is estimated the company will receive from the United States by reason of the completion of the said road;

870 NOW, THEREFORE, THIS INDENTURE, MADE BY WAY OF SUPPLEMENT TO THE SAID ORIGINAL INDENTURE, FURTHER WITNESSETH: That the said original indenture of mortgage be and is hereby modified so as to allow bonds to be issued from time to time and at any time after the execution of this indenture, on the resolution of the Board of Directors or Executive Committee of said New Orleans Pacific Railway Company, to the full extent of the quantity of lands, which, it is estimated, the said company will receive from the United States by reason of the completion of said railroad, at the rate of not exceeding two dollars and a half per acre, in advance of the issue of patents or certificates by the United States to the said New Orleans

Pacific Railway Company; and the said trustees 871
 are hereby authorized, from time to time, at any
 time after the execution hereof, to certify and de-
 liver bonds hereunder to the New Orleans Pacific
 Railway Company, at the rate of not exceeding two
 dollars and a half per acre, to the extent aforesaid,
 upon the receipt by them or their successors or sur-
 vivor, of a certified copy of a resolution of the
 party of the first part, stating the number of bonds,
 to a certification of which the company is at the
 time entitled under the provisions hereof, which
 resolution thus certified shall be sufficient au-
 thority and full protection to the trustees to make,
 from time to time, the certificate endorsed on the 872
 said bonds and certify and deliver bonds to the
 said railway company, on the receipt of its presi-
 dent or of any other officer or agent authorized to
 receive the same on behalf of said railway company
 pursuant to such resolution, and no duty exists or
 is imposed on the trustees to look behind any such
 resolution before so certifying the bonds and de-
 livering the same. The said trustees or the said
 railway company are authorized and directed to
 stamp and endorse upon such of the said bonds
 as may be issued before the patenting of the lands,
 the following:

“This bond is issued pursuant to an Original 873
 Mortgage referred to in the bond, dated the 17th
 day of April, 1883, and a Supplemental Mortgage,
 dated the day of January, 1884, which
 supplemental mortgage recites that the New
 Orleans Pacific Railway Company has completed
 its road from New Orleans via Baton Rouge and
 Alexandria to a connection with the Texas & Pacific
 Railway at Shreveport, and that the same has been
 accepted by the President of the United States, and
 thereupon modifies the provisions of the Original
 Mortgage and of the within bond, so as to authorize
 the said railway company to issue, and the trustees

874 to certify bonds, as provided in the said mortgage and supplement, at the rate of not exceeding two dollars and a half an acre for the number of acres of land, which, it is estimated, the company will receive from the United States, in advance of the issue of patents or certificates by the United States."

875 And said trustees may also add to the form of the trustees' certificate on the said bonds as prescribed in the original mortgage, words to show that the bonds are issued under the said mortgage as modified by this supplemental indenture, so as that the said certificate of the trustees will read as follows:

"It is hereby certified that this bond is one of the bonds secured by the said Land Grant and Sinking Fund Mortgage, and that it is issued in conformity with its provisions and those of said supplemental mortgage."

Trustees.

876 It is agreed by and between the parties hereto, and each bondholder secured hereby, that the officers of the Land Department of the New Orleans Pacific Railway Company, or by consent of that company, and the trustees, and the Texas Pacific Railway Company, that the officers of the Land Department of the said last-named railway company may act for the trustees in the sale of lands on the terms specified in that behalf in the original indenture of mortgage; and that the trustees shall not be personally liable for any acts or defaults of any of such officers; and it is also further agreed, that notwithstanding the said the original mortgage and this indenture, the said New Orleans Pacific Railway Company may carry out the written agreement of date January 4, 1882, be-

tween the said railway company and the Hon. 877
 E. W. Robertson and the Hon. N. C. Blanchard, in
 behalf of settlers and occupiers on the lands within
 the limits of said land grant, but that the net pro-
 ceeds of all sales made to such settlers and occupiers
 shall be received by the trustees for the benefit of
 the trust created by the original mortgage and this
 supplement thereto, and on the receipt of such pro-
 ceeds, or on payment to them of the notes or obliga-
 tions of such purchasers, the trustees may release
 the said lands from the lien of the said original and
 this supplemental mortgage.

And it is also further agreed by and between and 878
 on behalf of the parties aforesaid, that the said
 railway company has the power and authority to
 settle and compromise any disputes which now
 exist, or may at any time arise, touching or con-
 cerning the title to any tract or tracts of land em-
 braced, or claimed to be embraced, within the said
 land grant subject to the approval of said trustees,
 and the trustees may, on the receipt of the benefits
 of such settlement or compromise, release the lien
 of the original and of this supplemental mortgage
 as to such tract or tracts.

It is hereby declared that the said original in- 879
 denture of mortgage is in full force and effect, ex-
 cept as herein modified, and that that instrument
 and this instrument and the said bonds and the
 indorsements thereon, are to be taken and read as
 one instrument.

To carry out and effectuate the said original
 mortgage as modified by this supplement thereto,
 THIS INDENTURE FURTHER WITNESSETH: That the
 said NEW ORLEANS PACIFIC RAILWAY COMPANY, in
 consideration of the premises and of one dollar to
 it in hand paid by the parties of the second part,
 receipt whereof is hereby acknowledged, in order
 to secure, in the manner hereinbefore stated, the
 payment in the manner provided, of the sums of

880 money mentioned in the said bonds, and interest thereon, issued or to be issued, as in the said original mortgage and in this indenture set forth, has granted, bargained, sold, assigned, conveyed and confirmed, and by these presents doth grant, bargain, sell, convey, assign and confirm unto the said parties of the second part, as trustees, as joint tenants and not as tenants in common, and to their survivor or successor, or successors and their heirs and assigns forever, all and singular the said several sections of land, and each and every part thereof, granted as aforesaid to the said New Orleans, Baton Rouge and Vicksburg Railroad Company, by
 881 the said Act of Congress, approved March 3, 1871, and also all the estate, right, title, interest, claim and demand whatsoever, at law or in equity, of, in or to the same, or any part or parcel thereof, which the said New Orleans Railway Company now has, holds, owns or is entitled to, or hereafter may or shall acquire, hold, own or be or become entitled to by force or virtue of the said Act of Congress, saving, excepting and reserving, however, from this indenture all parts and parcels of the said lands which are or shall be included in the railroad of the said New Orleans Pacific Railway Company, or used for the construction or operation thereof,
 882 or for the tracks, yards, depot grounds, not exceeding twenty acres at any one station, buildings or erections thereof.

To HAVE AND TO HOLD, all and singular the premises hereby granted, or intended to be, with all the appurtenances thereunto belonging, unto the said parties of the second part, as joint tenants, and their successors and survivor, and their and his heirs and assigns forever, as trustees, for the uses and purposes and upon the trusts and agreements in the said original mortgage and in this indenture set forth and declared, and subject to the

provisions and requirements of the aforementioned 883
Act of Congress.

It being well understood that each and all of said lands, by this instrument and said original mortgage conveyed or intended to be conveyed, are mortgaged, hypothecated and affected, in favor of said trustees and every holder of said bonds, and any of them, for the securing of each and every obligation created and evidenced by the said bonds; and that the said bonds secured hereby do not, nor does this indenture or the said original indenture, nor any statement or provision therein create any warranty or impose any liability *in personam* on the party of the first part or its successor or 884
their stockholders, and is no lien or charge on any property except the property mortgaged.

It is understood and agreed that the said trustees, or their successors or the survivor, have full power to convey the lands or any of them in this or the original mortgage conveyed to said trustees, according to the terms of said indentures, and their conveyance shall vest in the purchasers or grantees a full and absolute title (without warranty or personal liability or covenant on the part of the railway company or said trustees) to the said lands, without the joinder therein of either the New Orleans Pacific Railway Company or the 885
Texas and Pacific Railway Company; and for this purpose the estate and title in and to said lands aforesaid described, are hereby granted, bargained, sold and conveyed to said trustees by the said party of the first part. The said trustees are also hereby vested with full power to do every act necessary or proper in their best judgment to carry out and effectuate the purposes of the original and of this supplemental indenture.

Lands may be appraised and sold in the manner and for the purposes specified in the original

- 886 mortgage in advance of the issue of patents by the United States.

The lands herein mortgaged having been excepted by the New Orleans Pacific Railway Company from its conveyance to the Texas and Pacific Railway Company, on the consolidation of said companies, the trustees are to render account to and to deal with and consider the New Orleans Pacific Railway Company as the mortgagor and holder and owner of the equity of redemption in respect of said lands, until it otherwise provides by due corporate act or action duly notified to said trustees.

- 887 This indenture is executed in thirty duplicate originals for the purpose of facilitating the recording thereof, each of which is complete in itself, and all are to be taken as constituting but one instrument.

IN WITNESS WHEREOF, the said party of the first part has hereunto affixed its corporate seal and caused these presents to be attested by its President and Secretary at New Orleans, this fifth day of January, 1884.

[SEAL.]

By order of the Board of Directors.

888

(Signed) E. B. WHELOCK

President.

" WM. S. NICHOLSON

Secretary.

Signed, sealed and delivered }
in presence of }

Attest:

(Signed) T. J. KEANE

" J. Y. B. HASKELL

STATE OF LOUISIANA, }
 Parish of Orleans, City of New Orleans. }

889

BE IT REMEMBERED, that on the fifth day of January, A. D. one thousand eight hundred and eighty-four, before me, the undersigned, a Notary Public in and for the Parish of Orleans, State of Louisiana, duly commissioned and authorized to take the acknowledgment and proof of the execution of deeds and other instruments of writing, to be recorded or used in the State of Louisiana, as also to administer oaths, affirmations, etc., and to take and certify depositions, personally appeared the above named Edward B. Wheelock, the President, and W. S. Nicholson, the Secretary, of the New Orleans Pacific Railway Company, and executed the above instrument of writing in my presence, and that of the two witnesses whose names are thereto subscribed as such; and thereupon said Edward B. Wheelock, as President, and said W. S. Nicholson, as Secretary, of said New Orleans Pacific Railway Company, acknowledged that they had signed and executed the same as their act and deed, for the consideration, uses and purposes there mentioned, in their said respective capacities, and as the act and deed of said New Orleans Pacific Railway Company. 890

And said Messrs. Wheelock and Nicholson, being by me first duly sworn, did, each for himself, depose and say, that the said E. B. Wheelock is the President, and said W. S. Nicholson is the Secretary, of the New Orleans Pacific Railway Company; that in such capacities they signed and executed the above instrument by order of the Board of Directors, as and for the act and deed of said New Orleans Pacific Railway Company; that the seal thereto affixed is the corporate seal of said 891

892 company, and that it was affixed by order of the
Board of Directors.

IN TESTIMONY WHEREOF, I have here-
unto set my hand and affixed my seal
[SEAL.] of office, as Notary Public aforesaid, at
my office, in said City of New Orleans,
on the day and date above written.

(Signed) SAML FLOWER
Notary Public.

EXHIBIT I OF BILL (LIST OF 1183 BONDS).

893

Filed March 3rd, 1890.

List of Bonds number Mortgage of 1872 held
by Complainants.

EXHIBIT.

Bond Nos.		No. of Bonds.
27 to	35 inclusive.....	9
37 "	42 "	6
44 "	50 "	7
52 "	377 "	326
379	1
381 to	385 inclusive.....	5
894 392 "	503 "	112
508 "	510 "	3
515	1
517 to	750 inclusive.....	234
781 "	1036 "	256
1038 "	1050 "	13
1061 "	1200 "	140
1506 "	1575 "	70

Total No. of Bonds.....1183

Amended and Supplemental Bill.

895

Filed March 8, 1890.

U. S. CIRCUIT COURT

E. D. OF LOUISIANA

JOHN F. DILLON *et al*

vs

THE NEW ORLEANS PACIFIC
RAILWAY COMPANY *et al*

11,885

In Equity

896

TO THE JUDGES OF SAID COURT

The amended and supplemental bill of the complainants further shows:

That they annex herewith as exhibits "M," "N" and "O" of this and of the original bill, copies of said bills of complaint filed in the U. S. Circuit Court for the Western District of Louisiana by said Crooks and Carter, and also by said Lander, and which have each been dismissed on motion of said Complainants respectively. Also copy of said motion to intervene of said Lander marked "P."

897

They further show that to prevent a multiplicity of suits and irreparable injury in the premises, a restraining order and injunction *pendente lite* are necessary and proper, in the premises, prohibiting said Crooks, Carter and Lander, and Albert H. Leonard their agent, and prohibiting said Leonard as agent of the said unknown holders of bonds issued under the said mortgages of 1870 and 1872, from carrying on or bringing any further and other suits on said bonds or mortgages or any of them, except by proper proceedings in this cause, to the

898 end that the liens on said Land Grant Lands may be ascertained and adjusted and clouds on title prevented and removed and they pray for such relief and orders and for all general relief.

(Signed) HOWE & PRENTISS

U. S. of America ss.

WILLIAM W. HOWE being duly sworn says that he is one of the Solicitors and Counsel of the Complainants in this cause and has been instructed by them to institute this suit. That they reside in New York and are both absent from this District and it is necessary for deponent to verify the pleadings herein. That he has prepared and read the bill of complaint and amended and supplemental bill in this cause, and the same are true of his own knowledge except as to matters therein stated on information and belief and as to those matters he believes them to be true.

899

(Signed) W. W. HOWE

Sworn to and subscribed before me }
this 8th day of March 1890 }

[SEAL] (Signed) E. R. HUNT
Clerk.

Decree pro Confesso

901

Entered and Filed October 14 1890

U. S. CIRCUIT COURT

E. D. OF LOUISIANA

No. 11,885.

JNO. F. DILLON *et al*

vs

NEW ORLEANS PACIFIC RAIL-
WAY COMPANY *et al*.

In Eq.

At New Orleans. 902

Decree pro confesso.

On motion of Howe and Prentiss, solicitors for complainants and suggesting that process of subpoena has been duly issued and served herein according to law and the orders of the Court on

The New Orleans Pacific Railway Company and
The Union Trust Company of New York
defendants herein, and no appearance has been
made herein by said defendants or either of them.

And that the New Orleans Baton Rouge & Vicks-
burg Railway Company, appeared herein on the
25 day of April 1890, but has not filed any de-
murrer, plea or answer or other pleading. 903

And that the time limited for said defendants
has long since expired.

It is ordered that the Bill of Complaint herein
be now taken *pro confesso* as against said defend-
ants and each of them.

Oct 14th 1890.

(Signed) DON A. PARDEE,
Circuit Judge.

904

Order

Entered and Filed November 16, 1891.

U. S. CIRCUIT COURT

E. D. OF LOUISIANA

No. 11,885.

905

JOHN F. DILLON *et al*
 VS
 THE NEW ORLEANS PACIFIC
 RAILWAY COMPANY *et al*

At N. O.

On motion of Howe & Prentiss solicitors for complainants and suggesting that the complainants desire to dismiss the bill of complaint and the supplemental bill of complaint as to the defendants John B. Crooks, Edward Lander, Everett H. Carter, and Albert H. Leonard only but without prejudice;

906

It is ordered that leave to do so be granted and accordingly that the said Bills of Complaint herein be dismissed as to said defendants only; but without any prejudice to the rights of the complainants as against the said defendants; and without prejudice to the right of complainants to institute such new action in the premises as they may be advised and may desire to do.

New Orleans La. Nov 16 1891.

(Signed) DON A. PARDEE,

Circuit Judge.

Copy of Decree as Exhibit

907

Filed Nunc Pro Tunc as of November 16, 1891.

UNITED STATES CIRCUIT COURT,

FIFTH CIRCUIT AND EASTERN DISTRICT OF LOUISIANA.

THE NEW ORLEANS PACIFIC
RAILWAY COMPANY and THE
NEW ORLEANS, BATON ROUGE
& VICKSBURG RAILWAY COM-
PANY.

VS.

THE UNION TRUST COMPANY
OF NEW YORK, and JOHN F.
DILLON and HENRY M. ALEX-
ANDER.

No. 11,753
In Equity.

908

DECREE.

This cause came on to be heard at this term, on pleadings and proof, and was argued by counsel:

And therefore, upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED

909

1. That the complainant the New Orleans Pacific Railway Company is the owner and possessor by recorded title, of the lands set forth and described in the bill of complaint, granted by the 22nd Section of the Act of the Congress of the United States, entitled "An Act to Incorporate the Texas Pacific Railroad Company, and to aid in the Construction of its road and for other purposes" approved March 3d, 1871, unto the New Orleans, Baton Rouge & Vicksburg Railroad Company and

- 910 its assigns; which land-grant and lands are situate partly in the Eastern and partly in the Western District of Louisiana; and are specifically described in the Patents thereof Numbers "One", "Two," "Three" and "Four" executed by the United States of America by Chester A. Arthur, President, unto the said New Orleans Pacific Railway Company, March 3, 1885, and recorded in the various parishes of Louisiana in which said Land Grant and its lands are situate in June, 1885, and in the Patents Numbers "Five" and "Six" executed by said United States, by Benjamin Harrison, President, unto the said New Orleans Pacific Railway Company,
- 911 August 8, 1889; and in the Patent Number "Seven" executed by said United States, by Benjamin Harrison, President, unto the said New Orleans Pacific Railway Company, November 8, 1889; and further described in the Selections thereof made under said Act of Congress of 1871, and the Lands Laws of the United States, and now on file in the office of the Secretary of the Interior of the United States; as well as of all lands acquired and earned by said New Orleans Pacific Railway Company under said Act of 1871, and the Act referring thereto of February 8th, 1887; and that the title to said lands, as well patented as selected and
- 912 earned, included in said grant and earned by the definite location and construction of the railroad of the New Orleans Pacific Railway Company, October 27, 1881, and November 16th, 1882, has been confirmed by said Act of Congress of February 3d, 1887, set forth in the bill of complaint, being Chapter 120 of the Public Acts of Congress of the year 1887.

SECOND. That the said New Orleans Pacific Railway Company by acts of mortgage dated respectively April 17, 1883, and January 5, 1884, and duly recorded in the said years respectively in

the several Parishes of Louisiana in which said 913
 land grant and lands are situate, duly mortgaged
 all said lands so earned by it to the defendants
 John F. Dillon and Henry M. Alexander, as Trus-
 tees of said Mortgages; of which mortgages dupli-
 cate originals are herein filed as Exhibits of the
 Bill of Complaint and that the bonds issued and
 secured by the said mortgages of the said lands
 have been utilized as set forth in the bill of com-
 plaint to pay for the construction of said railroad
 of the New Orleans Pacific Railway Company
 whereby said lands were earned.

THIRD. That the mortgage made on behalf of 914
 the New Orleans Baton Rouge & Vicksburg Rail-
 road Company, by Thomas C. Bates, President,
 unto the defendant, the Union Trust Company of
 New York by act before T. J. Beck, Notary, at
 New Orleans, October 1, 1870, mortgaging and
 hypothecating unto said Union Trust Company,
 and for the security of 6250 certain bonds therein
 described, the following property, by the following
 description, viz:

"The whole of the main line of railroad of the
 "said Company (the New Orleans, Baton Rouge &
 "Vicksburg Railroad Company) within the State
 "of Louisiana, commencing at Pontachoula, in the 915
 "Parish of Livingston, and extending thence to
 "the City of Baton Rouge in the Parish of East
 "Baton Rouge, forty miles more or less; thence
 "through the Parishes of East Baton Rouge and
 "East Feliciana to the State line of the State of
 "Mississippi forty-five miles more or less; also a
 "branch railroad commencing at the said City of
 "Baton Rouge and extending thence through the
 "Parishes of West Baton Rouge, Iberville, Pointe
 "Coupee, St. Landry, Avoyelles, Rapides, by way
 "of Alexandria, Natchitoches and DeSoto to
 "Shreveport or some other point on the Southern

- 916 "Pacific Railroad, in the Parish of Caddo between
 "Shreveport and the State line of the State of
 "Texas, two hundred and thirty-six miles more or
 "less; also another branch railroad intersecting
 "the branch railroad last described, and extending
 "thence by way of the town of Washington to
 "Opelousas in the Parish of St. Landry sixteen
 "miles more or less; also another branch railroad
 "commencing on the main line of said first de-
 "scribed railroad) in the Parish of East Baton
 "Rouge, and extending through the Parishes of
 "Ascension, St. James, St. John the Baptist, St.
 "Charles and Jefferson to the Mississippi River at
 917 "the City of New Orleans eighty-five miles more or
 "less; also another branch railroad commencing
 "on the said first described main line at Ponta-
 "choula, extending thence in a northeasterly direc-
 "tion through the Parishes of Tangipahoa, St. Tam-
 "many and Washington to the State line of Mis-
 "sissippi to connect with the New Orleans & Meri-
 "dian railroad seventy-five miles more or less; in
 "all about five hundred and one miles of railroad
 "within the said State of Louisiana. Together
 "with the right of way, road-bed, rails, depots, sta-
 "tions, shops, buildings, machinery, tools, engines,
 "cars, tenders and other rolling stock; also all real
 918 "and personal estate within the State of Louisiana
 "owned by the said Company at the date of this
 "mortgage or which may be acquired by it there-
 "after appurtenant to or necessary for the opera-
 "tion of said main line of said railroad or any of
 "said branches connected with the said main line
 "or to be connected therewith. Also all other
 "property real and personal of every kind and
 "description whatsoever, and wheresoever situated
 "in the state of Louisiana, which is now owned or
 "which shall hereafter be acquired by the said com-
 "pany, and which shall be appurtenant to or neces-
 "sary or used for the operation of said main line

"of railroad or any of said branches. Also the 919
 "tenements, hereditaments and appurtenances
 "thereunto belonging and all of the estate, right,
 "title and interest, legal and equitable of the said
 "company and its successors and assigns therein:
 "Together with the corporate franchises and priv-
 "ileges of said Company at any time granted or
 "to be granted by the State of Louisiana relative
 "to the construction, operation and use of said
 "railroad within said State"—could not, and was
 not intended to, did not, and does not, embrace,
 cover, include, mortgage, hypothecate or affect the
 lands so granted as aforesaid by the said Act of
 Congress of March 3d, 1871, Section 22, and con- 920
 firmed by said Act of Congress of February 8th,
 1887, and patented by the United States to the New
 Orleans Pacific Railway Company by said patents
 numbers, One, Two, Three and Four of March 3d,
 1885, or by said patents numbers Five and Six of
 August 8th, 1889, or by said patent number Seven
 of November 8th, 1889, or any other lands earned
 and selected or to be selected under said Acts of
 March 3d, 1871, and February 8th, 1887; and cre-
 ates no lien thereon or right in, on or to the same or
 any part thereof; and that the said Mortgages made
 as aforesaid of said granted Lands by the New
 Orleans Pacific Railway Company April 17th, 1883, 921
 and January 5th, 1884, unto said John F. Dillon
 and Henry M. Alexander, Trustees, constitute a
 lien on said lands and each and every part and par-
 cel thereof, for the security of the bonds issued
 thereunder and all other stipulations of said
 indentures.

And it is further ORDERED that the defendants
 herein do pay the costs of this suit which have been
 taxed at the sum of Seventy-nine and fifty hun-
 dredths dollars (\$79.50).

922 This done and signed in open Court at New Orleans, Louisiana, this 22d day of March A. D. 1890.

(Signed) DON A. PARDEE,
Circuit Judge.

CLERK'S OFFICE:

I certify the foregoing to be a true copy of the original on file and of record in this office:

Witness, my hand and seal of said Court, at the City of New Orleans, this 24th day of March, 1890.

(Signed) E. R. HUNT,
Clerk.

[SEAL.]

923

Decree.

ENTERED & FILED NOVEMBER 16, 1891.

UNITED STATES CIRCUIT COURT

EASTERN DISTRICT OF LOUISIANA.

JOHN F. DILLON and HENRY H.
ALEXANDER, Trustee,

924

vs.

THE NEW ORLEANS PACIFIC
RAILWAY COMPANY, THE
NEW ORLEANS, BATON ROUGE
& VICKSBURG RAILROAD COM-
PANY, and THE UNION TRUST
COMPANY OF NEW YORK.

No. 11,885
In Equity
At New Orleans.

This cause came on to be heard on the bill of complaint and amended and supplemental bill, and the exhibits and documentary evidence therewith

filed, and proceedings heretofore had herein; and 925
 on the decree *pro confesso* made, entered and signed
 herein on the 14th day of October, 1890; and was
 argued by counsel: On consideration whereof it
 is now

ORDERED, ADJUDGED AND DECREED, that the said
 decree *pro confesso* against the said defendants the
 New Orleans Pacific Railway Company, the New
 Orleans, Baton Rouge & Vicksburg Railroad Com-
 pany and the Union Trust Company of New York
 be and the same is hereby confirmed and made abso-
 lute and final; and accordingly—

First. It is ordered, adjudged and decreed that 926
 the mortgage made on behalf of the New Orleans,
 Baton Rouge & Vicksburg Railroad Company by
 Thomas C. Bates appearing as its President, before
 T. J. Beck, Notary, at New Orleans October 1,
 1870, unto the Union Trust Company of New York,
 whereof a copy is filed in this cause and is made
 part of this decree as Exhibit "G", was not in-
 tended to, and did not, include, mortgage, hy-
 pothecate or affect the lands patented March 3,
 1885, by the United States to the New Orleans
 Pacific Railway Company under the Act of Con-
 gress of March 3, 1871, chapter 122, or any part
 thereof; or any of the lands patented to the said 927
 New Orleans Pacific Railway Company since
 March 3, 1885, under said Act of Congress of March
 3, 1871, chapter 122, and the Act of Congress of
 February 8, 1887, chapter 120, or selected or due,
 or to become due, under said law; and creates no
 lien thereon or right on, in, or to, the same or any
 part thereof. And it appearing to the Court from
 the record, proceedings and decree therein now re-
 maining of record, in the case of the New Orleans
 Pacific Railway Company and the New Orleans
 Baton Rouge & Vicksburg Railroad Company *vs.*
 The Union Trust Company of New York and John

- 928 F. Dillon and Henry M. Alexander, being Equity Cause No. 11,753 on the docket of this Court, which said suit passed to final decree after the bringing of the present suit (a copy of which final decree is filed in this cause), that it was finally adjudged and decreed in the said cause No. 11,753 by this Court, on the 22d of March, 1890, that the New Orleans Pacific Railway Company is the owner and possessor by recorded title of all lands described in the bill of complaint therein and in said patents Nos. 1, 2, 3 and 4 executed by Chester A. Arthur, President of the United States, March 3, 1885, and patents Nos. 5 and 6 executed by Benjamin Harrison, President of the United States, August 8, 1889, and patent No. 7 executed by Benjamin Harrison, President, November 8, 1889, as well as of all lands acquired and earned by the New Orleans Pacific Railway Company under the Acts of March 3, 1871, and February 8, 1887; that the said New Orleans Pacific Railway Company, by acts of mortgage dated respectively April 17, 1883, and January 5, 1884, and duly recorded, duly mortgaged all of said lands so patented and earned to the said Dillon and Alexander; that the mortgage made on behalf of the New Orleans, Baton Rouge & Vicksburg Railroad Company by Thomas C. Bates to the Union Trust Company of New York, by act before T. J. Beck, Notary, at New Orleans, October 1, 1870, could not and was not intended, did not and does not, embrace, cover, include, mortgage, hypothecate or affect the land so granted by the Act of Congress of March 3, 1873, section 22, and confirmed by Act of Congress of February 1, 1887, and patented by the United States to the New Orleans Pacific Railway Company by patents hereinbefore mentioned, and that the same creates no lien thereon or right in, on, or to the same or any part thereof; and that the said mortgages made as aforesaid of the said granted lands by the New
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- 930

Orleans Pacific Railway Company April 17, 1883, 931
 and January 5, 1884, to the said Dillon and Alexander, Trustees, do constitute a lien on the said lands and each and every parcel thereof for the security of the bonds issued thereunder, and of all the other stipulations of the said indenture; Now it is ordered and decreed that the present decree, nor anything contained therein, shall not prejudice, impair or affect the said final decree rendered by this Court in said cause No. 11,753, or the rights and equities of the said New Orleans Pacific Railway Company or of Dillon and Alexander, Trustees.

Second. It is further ordered, adjudged and decreed, that the defendant the New Orleans, Baton Rouge & Vicksburg Railroad Company never made any definite location of its railroad and never constructed any part of the same; that the railway contemplated by the twenty-second section of said Act of Congress of March 3, 1871, chapter 122, was constructed at great expense by the defendant the New Orleans Pacific Railway Company, and in part by the issue and use of its bonds secured by its mortgages of April 17th, 1883, and January 5, 1884, whereof duplicate originals are filed herein and are made part of the bill of complaint, and of this decree as exhibits "E" and "F"; that the lands 932
 granted by the twenty-second section of said Act of Congress of March 3, 1871 were confirmed to the said New Orleans Pacific Railway Company by the Act of Congress of February 8, 1887 chapter 120; that the said mortgages made unto the complainant constitute a valid and first lien on all the lands granted by said Act of 1871 and confirmed by the said Act of 1887; and that the mortgage made on behalf of the New Orleans, Baton Rouge & Vicksburg Railroad Company by Calvin H. Allen appearing as its President, before T. J. Beck, Notary, at 933

- 934 New Orleans, September 4, 1872, unto the Union Trust Company of New York, and of which a copy is filed in this cause, and is made part of this decree as Exhibit "H", did not and does not cover, attach to, mortgage, hypothecate or affect the lands patented by the United States to the New Orleans Pacific Railway Company March 3, 1885, under said Act of Congress of March 3, 1871, chapter 122, or any part thereof, or any of the lands patented to the said New Orleans Pacific Railway Company since March 3, 1885, under said Acts of 1871 and 1887, or selected or due under said laws, and creates no lien thereon or right in or to the same or any part thereof.
- 935

AND IT IS FURTHER ORDERED that the defendants herein do pay the costs of this suit in the sum of One Hundred Sixteen 95 100 Dollars.

New Orleans La

Nov 16 1891.

(S. Jnd) DON A. PARDEE,

Circuit Judge.

Decree as far as costs are concerned and as to New Orleans Pacific Railway Co. as to such costs, is hereby satisfied and may be cancelled to that extent.

936

July 7, 1898.

(Signed) W. W. HOWE,

Sol. for Compl.

UNITED STATES OF AMERICA.

937

DISTRICT COURT OF THE UNITED STATES,

Eastern District of Louisiana.

CLERK'S OFFICE:—

I, HENRY J. CARTER, Clerk of the District Court of the United States for the Eastern District of Louisiana, do HEREBY CERTIFY that the foregoing 184 pages contain and form a full, complete, true and perfect transcript of the Record and Proceedings had in the case of

938

JOHN F. DILLON, *et al.**vs.*NEW ORLEANS PACIFIC RAILWAY COMPANY, *et als.*,

No. 11,885 of the Docket of the late United States Circuit Court, Eastern District of Louisiana.

WITNESS, my hand and the seal of said Court, at the City of New Orleans, Louisiana, this 10th day of February, A. D. 1915.

[SEAL]

H. J. CARTER

Clerk.

939

(10c. U. S. Revenue stamp attached.)

I, RUFUS E. FOSTER, United States Judge for the Eastern District of Louisiana, do certify, that HENRY J. CARTER, whose name is signed to the above certificate as Clerk of the District Court of the United States for the Eastern District of Louisiana, was, at the time of signing said certificate, and is now the Clerk of said Court: That said certificate

940 is in due form of law, and that full faith and credit
are due to his official attestations as such Clerk.

Given under my hand, at the City of
New Orleans, in said district, this
10th day of February, A. D. 1915.

RUFUS E. FOSTER,
Judge.

(10c. U. S. Revenue stamp attached.)

941 I, HENRY J. CARTER, Clerk of the District Court
of the United States, for the Eastern District of
Louisiana, do hereby certify that I am well
acquainted with the handwriting of Honorable
Rufus E. Foster, whose name is subscribed to the
next above instrument of writing and that his sig-
nature thereto is genuine, and I do further certify
that he was at the date thereof Judge of the Dis-
trict Court of the United States for the Eastern
District of Louisiana, duly commissioned and
qualified, and acting as such.

WITNESS, my hand and the seal of said
Court, at the City of New Orleans,
[SEAL.] Louisiana, this 10th day of February,
A. D. 1915.

942 H. J. CARTER
Clerk.

(10c. U. S. Revenue stamp attached.)

TESTIMONY OF WILLIAM H. ABRAMS, WITNESS
FOR DEFENSE.

943

I have been connected with the Texas & Pacific Railway Company since the year 1873, as assistant in charge of the Land and Tax Department for about two years or until some time in the year 1875, and since then in charge of the Land and Tax Department of that Company. The records of our Company contain the titles to the various rights of way of lands in the State of Louisiana. The Texas & Pacific and New Orleans Pacific Railway Company runs between Shreveport and New Orleans, 944 the main line emerging from Texas into Louisiana, first, in the Parish of Natchitoches, next is De Soto, the next is Rabides, the next is Avoyelles, the next is St. Landry, the next is Pointe Coupee, the next is Iberville and the next West Baton Rouge. From West Baton Rouge it runs through Ascension, St. James, St. John, St. Charles and Jefferson, the latter being at the opposite of the river. I have been in charge of the Land Department of the Texas & Pacific Railway Company since June, 1881, when the Articles of Consolidation were made with the New Orleans Pacific. I was the custodian of the right of way and depot ground deeds and had the rendering of the property for the purposes of tax- 945 ation in the three states through which the Texas & Pacific ran, namely, Texas, Louisiana and Arkansas. Since the year 1881 or 1882, I have rendered this property of the Texas & Pacific Railway Company for taxation. And it has been my duty to see as to the payment of the taxes on same. The Texas & Pacific main line does not cross any of the lands included in the so-called New Orleans Pacific grants, or the road prior to that, from Baton Rouge to New Orleans. Baton Rouge is about 91 miles

- 946 from New Orleans. We call it Baton Rouge Junction. As to the road from Baton Rouge Junction to Shreveport, a large portion of the right of way is held under deed from individuals. There was no land grant; the road does not cross but very few land grants, none east of West Baton Rouge, and very few between West Baton Rouge and Shreveport. I should say there are some 13 or 14 sections of land that are in this land grant portion and which now constitute a part of our right of way. I should say about 12 miles. Some of the sections crossed in a direct straight line. If there were a
947 straight line parallel to any of the exterior lines of this section it would be just a mile. In some of the sections, the road widens through, as it were, and of course in such sections there would be greater mileage. I would not say positively but is between 12 and 15 sections of land grant lands through which our right of way extends. It is not in excess of 15. Where land grant sections are crossed land was vacant apparently for the reason of being of very little value. They are swamps and all that; some of it timber land where the surveys had been made and the corners marked the swamps and the undergrowth had grown up so it would be difficult
948 if not impossible, to find the corners. In that country the land was located without knowledge as to the sections they were on at the time the road was being built. The average right of way, I should say, is 150 feet outside of the towns; that is 75 feet on each side of the centre of the road. In rendering the lands for taxation we always include the acreage that the deeds call for. We do not render any part of the right of way for taxation under the law of Louisiana based on a 400 feet right of way. The railroad is assessed at so much per mile to include

William H. Abrams.

all physical properties and the land and everything else with the exception of the rolling stock which is valued as a separate item. The Texas & Pacific Railway Company since 1887 has been openly and freely in possession of what we call the New Orleans Pacific and is at this time. I think the construction of the road began at Shreveport in 1881 and extended east and there was incorporated with the New Orleans Pacific a previously constructed 66 miles of road east of West Baton Rouge. The whole line was opened between Shreveport and New Orleans late in the year 1882. 949

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CROSS-EXAMINATION BY MR. OSBORN :

I do not remember the right of way as shown in the map filed by the Baton Rouge Road. My idea is that the New Orleans Pacific was constructed through the belt of land that was withdrawn from sale, but just wherein I do not know. The Texas & Pacific used the road as constructed by the New Orleans Pacific from West Baton Rouge to Shreveport. I never heard that the government inspectors reported upon the construction of the New Orleans Pacific road that it follows the right of way as shown upon the map of location filed by the Baton Rouge Road. My connection with the New Orleans Pacific really did not commence until after it was turned over as a portion of the Texas Pacific. I never had any connection with Land Department of the New Orleans Pacific until after the road was constructed and the title papers and deeds and maps were all turned over to me and I made it my business to find out what the company owned. I know where the road is located from actual condi- 951

William H. Abrams.

952 tions. The records at Washington would not
change my opinion.

Remark by Court:

His testimony was that excepting 12 to 15 sections, they bought the title from the outside.

Ans. Yes.

By Mr. Osborn:

953 You bought off the adverse claims? Ans. The
line between West Baton Rouge and Shreveport of
the New Orleans Pacific was through well settled
country, a well developed country, along the entire
line. It had been occupied by plantations for years
and years, excepting in the swamp country where
the land was still in the hands of the government
and was included in this grant. If they had been
of value they would have been taken up long
previous. I do not know how many acres of land
were given to the New Orleans Pacific Railroad
Company. I never had any connection with the
land grant of that road. It is 326 miles from New
Orleans to Shreveport and 89 miles from West
Baton Rouge Junction to New Orleans. In round
954 numbers it is about 260 miles from Shreveport to
West Baton Rouge.

At a Term of the District Court of the 953
 United States for the Southern Dis-
 trict of New York in the Second
 Judicial Circuit in the City of New
 York, on the 25th day of February,
 1915.

Present: Hon. WALTER EVANS,
United States District Judge.

DAVID J. WALLER, JR. and LEVI
 E. WALLER, Trustees under
 the Last Will and Testament
 of David J. Waller, deceased,
 in their own behalf and in
 behalf of all other bondhold-
 ers secured by a Deed of
 Trust made by the NEW OR-
 LEANS BATON ROUGE AND
 VICKSBURG RAIL ROAD COM-
 PANY, dated the 4th day of
 September, 1872,

Complainants,

956

AGAINST

THE TEXAS & PACIFIC RAILWAY
 COMPANY, NEW ORLEANS
 PACIFIC RAILROAD COMPANY
 and UNION TRUST COMPANY,
 of New York,

Defendants.

957

Decree.

This cause having come on for final hearing upon
 the bill of complaint of the complainants and the

958 answer thereto of the defendant, The Texas & Pacific Railway Company, and upon the proofs taken by and upon behalf of the said complainants and the said defendant, The Texas & Pacific Railway Company, and arguments having been duly made and submitted by Mr. C. C. Calhoun, Mr. W. A. Milliken, Mr. David Bennett King and Mr. William Russell Osborn on behalf of the complainants, and by Mr. Thomas J. Freeman, Mr. Lawrence Greer and Mr. F. C. Nicodemus, Jr., on behalf of the defendant, The Texas & Pacific Railway Company, and it appearing to the Court from the record of this cause that an order was entered herein
959 on January 28, 1915, dismissing the bill of complaint herein as against the defendant The Union Trust Company,

Now upon due consideration of the bill of complaint herein and of the answer of the defendant The Texas & Pacific Railway Company, the evidence and arguments of counsel, it is

ORDERED, ADJUDGED AND DECREED that the bill of complaint herein be and the same is hereby dismissed with costs, and that the defendant, The Texas & Pacific Railway Company, recover from the complainants its costs and disbursements to be
960 taxed by the clerk and have execution therefor.

Enter:

WALTER EVANS,
United States District Judge.

Assignments of Error.

961

DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK

DAVID J. WALLER, JR. and LEVI
E. WALLER, Trustees under
the Last Will and Testament
of David J. Waller, deceased,
in their own behalf and in
behalf of all other bondhold-
ers secured by a Deed of
Trust made by the NEW OR-
LEANS BATON ROUGE AND
VICKSBURG RAILROAD COM-
PANY, dated the 4th day of
September, 1872,

Complainants,

AGAINST

THE TEXAS & PACIFIC RAILWAY
COMPANY, NEW ORLEANS
PACIFIC RAILROAD COMPANY
and UNION TRUST COMPANY,
of New York,

Defendants.

Equity
10-209

962

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Now come the complainants in the above en-
titled cause and file the following assignment of
errors upon which they will rely upon their prose-
cution of the appeal in the above entitled cause
from the decree made by this Honorable Court on
the 25th day of February, 1915.

964 The Court erred as follows:

I. In holding the grant by Act of Congress approved March 3, 1871, §22, gave to the New Orleans, Baton Rouge & Vicksburg Railroad Company only a conditional interest in the lands granted.

II. In holding that the "Map of General Route", filed by the New Orleans, Baton Rouge & Vicksburg Railroad Company with the General Land Commissioner of the Interior Department at Washington, was an insufficient map of its general location.

965 III. In failing to hold that the trust deed executed by the New Orleans, Baton Rouge & Vicksburg Railroad Company, September 4, 1872, was valid and binding on the lands granted by §22 of the Act of March 3, 1871, both the right of way and the alternate sections of land on each side of said right of way.

IV. In failing to hold that the Act of Congress, March 3, 1871, granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company, a title in fee to the right of way and the alternate sections of land, subject only to forfeiture by Congress, or
968 by the Judicial Department of the United States Government.

V. In failing to hold that the New Orleans Pacific Railroad Company, under its purchase of said right of way and alternate sections of land, from the holders of a majority of the stock of the Baton Rouge Company, took same subject to the lien created by the trust deed of September 4, 1872, in favor of complainants' bonds.

VI. In failing to hold that, as shown by the evidence, the filing of its Map of General Route with

the Land Office and its acceptance by the Secretary 967
of the Interior and his withdrawal of the lands
from entry, was a compliance with the Act of Con-
gress and vested a perfect title in fee to the right
of way and the alternate sections of land, subject
only to forfeiture by an Act of Congress or the
Judicial Department.

VII. In holding that the instrument made by the
New Orleans, Baton Rouge & Vicksburg Railroad
Company to New Orleans Pacific Railroad Com-
pany, dated January 5, 1881, was not effectual to
vest the title to the said land grant in the New
Orleans Pacific Railroad Company.

968

VIII. In failing to hold that by virtue of the
said last named conveyance of January 5, 1881, the
said land grant and the right of way therein de-
scribed were conveyed to the New Orleans Pacific
Railroad Company, subject to the deed of trust
executed by the New Orleans, Baton Rouge & Vicks-
burg Railroad Company to the Union Trust Com-
pany as Trustee, dated September 4, 1872.

IX. In holding that the said conveyance of Jan-
uary 5, 1881, and the conveyance of June 20, 1881,
made by the New Orleans Pacific Railroad Company
to the defendant Texas & Pacific Railway Company, 969
did not affect the merger and consolidation of the
New Orleans, Baton Rouge & Vicksburg Railroad
Company with the defendant Texas & Pacific Rail-
way Company.

X. In holding the recital in the deed of trust
from the New Orleans Pacific Railroad Company to
Dillon & Alexander, Trustees, that the said New
Orleans Pacific Railroad Company accepted the
lands granted by Congress to the New Orleans,
Baton Rouge & Vicksburg Railroad Company, with-
out assuming or becoming liable for any of the

970 debts, obligations, claims or charges of the New Orleans, Baton Rouge and Vicksburg Railroad Company, established that said New Orleans Pacific Railroad Company did not assume such liabilities.

971 XI. In failing to hold that by the terms of the instrument of June 20, 1881, executed and delivered by the New Orleans Pacific Railroad Company to the defendant Texas & Pacific Railway Company, and by the deed of trust or mortgage, and the deed of trust and mortgage supplementary thereto, executed by the New Orleans Pacific Railroad Company to Dillon and Alexander, as Trustees, and dated respectively April 17, 1883, and January 5, 1884, the defendant Texas & Pacific Railway Company, as the owner and holder of substantially all of the capital stock of the New Orleans Pacific Railroad Company, received the benefits and proceeds of the said land grant charged with the express trust created by the deed of trust dated September 4, 1872, to secure the complainants' bonds.

972 XII. In failing to hold that the said land grant and right of way described in the deed of trust given to secure the complainants' bonds and dated September 4, 1872, was a trust fund in the possession of the defendant Texas & Pacific Railway Company, charged with an express trust for the application of the proceeds thereof to the payment of the complainants' bonds.

XIII. In holding that by the Act of Congress, approved February 8, 1887, the title to the land grant granted the New Orleans, Baton Rouge & Vicksburg Railroad Company under the Act of Congress approved March 3, 1871, was declared forfeited and the title thereto confirmed in the New

Orleans Pacific Railroad Company free of the trust or charge thereon requiring the payment of complainants' bonds as secured by the mortgage or deed of trust upon said grant dated September 4, 1872. 973

XIV. In failing to hold that pursuant to the Act of Congress approved March 3, 1871, the defendant Texas & Pacific Railway Company became liable, as a railroad merged and consolidated with the New Orleans, Baton Rouge & Vicksburg Railroad Company and the New Orleans Pacific Railroad Company, as in said Act provided, to pay certain obligations of the New Orleans Baton Rouge & Vicksburg Railroad Company, viz: complainants' bonds. 974

XV. In failing to hold that under the terms of the Act of Congress approved February 8, 1887, the defendant assumed and became liable to pay the obligations of the New Orleans, Baton Rouge & Vicksburg Railroad Company, viz: the bonds held by these complainants, in accordance with the provisions of said last named Act, as construed by the Commissioner of the Land Office, on the 5th day of January, 1889, upon the protest of one Babcock against the patenting of lands by the Government of the United States unto the New Orleans Pacific Railroad Company. 975

XVI. In failing to hold that the defendant Texas & Pacific Railway Company was and became merged and consolidated with the New Orleans, Baton Rouge & Vicksburg Railroad Company and the New Orleans Pacific Railroad Company, in accordance with the said Act of Congress of 1871, the said conveyance of January 5, 1881,

- 976 the conveyance of June 20, 1881, and the provisions of the said Act of 1857, and the decision of the Commissioner of the Land Office, dated January 5th, 1889.

XVII. In failing to hold that the report made by the defendant Texas & Pacific Railway Company to the General Commissioner of the Land Office, dated September 23, 1911, was a conclusive and binding admission by the said defendant that it has since 1881 been consolidated with the said New Orleans, Baton Rouge & Vicksburg Railroad Company and New Orleans Pacific Railroad Com-
 977 pany.

XVIII. In failing to hold that through the medium of the conveyances or deeds of trust made by the New Orleans Pacific Railroad Company after its consolidation with the defendant Texas & Pacific Railway Company to Dillon and Alexander, as Trustees, dated April 17, 1883, and January 5, 1884, and the provisions thereof, that the bonds secured by the said deeds of trust be delivered to the New Orleans Pacific Railroad Company, and that said bonds be exchangeable for lands, said defendant became possessed of and appro-
 978 priated unto itself lands granted by Congress to the New Orleans, Baton Rouge & Vicksburg Railroad Company and by said company conveyed to the Union Trust Company, as Trustee, to secure the payment of the complainants' bonds thereunder, pursuant to said deed of trust dated September 4, 1872.

XIX. In failing to hold upon all the facts proven in this cause, that the filing of the Articles of Agreement between the New Orleans Pacific Rail-

road Company and the defendant Texas & Pacific Railway Company, dated June 20, 1881, and filed in the office of the Secretary of State of the State of Louisiana at Baton Rouge, Louisiana, was insufficient to charge the complainants with notice thereof. 979

XX. In failing to hold that the defendant Texas & Pacific Railway Company fraudulently concealed the fact that it was the owner of and merged or consolidated with the New Orleans Pacific Railroad Company since the year 1881, and through such ownership and by the provisions of the conveyances of 1883 and 1884 to Dillon and Alexander, Trustees, it received and appropriated to itself the lands or the proceeds of the lands described in the deed of trust or mortgage dated September 4, 1872, and made by the New Orleans, Baton Rouge & Vicksburg Railroad Company to the Union Trust Company. 980

XXI. In failing to hold that the defendant Texas & Pacific Railway Company caused the said land grant to be conveyed by the New Orleans, Baton Rouge & Vicksburg Railroad Company to the New Orleans Pacific Railroad Company, and the last named company to convey the same to Dillon and Alexander, as Trustees, in fraud of the rights of the complainants, with knowledge of the trust created by the deed of September 4, 1872, and with the intent to appropriate to itself the said property or trust fund to defeat the rights of the complainants therein. 981

XXII. In failing to hold that the lands granted by this said Act approved March 3, 1871, to the New Orleans, Baton Rouge & Vicksburg Railroad Company, constituted a trust fund for the pay-

982 ment of the bonds held by the complainants, and the defendant Texas & Pacific Railway Company became possessed thereof, charged with an express trust to apply said fund to the payment of the bonds held by the complainants, and was and is subject to all duties, obligations and liabilities of an express trustee for the complainants with respect to same.

983 XXIII. In failing to hold that the defendant Texas & Pacific Railway Company, as the owner of the New Orleans Pacific Railway Company, was bound by and acquiesced in the decision of the Commissioner of the Land Office dated the 5th day of January, 1889.

XXIV. In failing to hold that the patents to lands included in said grant thereafter issued in the name of the New Orleans Pacific Railway Company were upon the express condition that the defendant pay the obligations of the New Orleans, Baton Rouge & Vicksburg Railroad Company, particularly its bonds held by these complainants, in accordance with said last named decision.

984 XXV. In failing to hold that the defendant Texas & Pacific Railway Company is now estopped to claim that it is not liable to or should not pay the bonds held by the complainants, out of the proceeds and benefits received from the said lands granted by Congress to the New Orleans, Baton Rouge & Vicksburg Railroad Company by the Act of March 3, 1871.

XXVI. In failing to hold that the covenants and provisions contained in the deed of trust made by the New Orleans, Baton Rouge & Vicksburg Rail-

road Company to the Union Trust Company, as Trustee, dated September 4, 1872, ran with and were charged upon the lands described therein, in the possession of both the New Orleans Pacific Railroad Company and the defendant the Texas & Pacific Railway Company, and that by reason of its acceptance of possession thereof and of the proceeds thereof became and is an express trustee charged with the performance and provisions of said covenants and provisions in said deed of trust contained for the benefit of these complainants. 985

XXV. In failing to hold that the defendant Texas & Pacific Railway Company, through its ownership of the New Orleans Pacific Railroad Company, the grantee of the said land grant, is estopped to question the validity of the title to said lands in its grantee, the New Orleans, Baton Rouge & Vicksburg Railroad Company. 986

XXVI. In failing to hold that pursuant to the Act of Congress approved February 8, 1887, the title to lands granted by the Government of the United States to the New Orleans, Baton Rouge & Vicksburg Railroad Company by the Act of March 3, 1871, lying west of the Mississippi River in the State of Louisiana, was not forfeited, but expressly confirmed in the New Orleans Pacific Railroad Company as assignee and grantee of the New Orleans, Baton Rouge & Vicksburg Railroad Company, pursuant to the deed or instrument made by the last named company to the former company dated January 5, 1881. 987

XXVII. In holding that the Statute of Limitations of the State of New York was a bar to the complainants' cause of action.

988 XXVIII. In holding that the Statutes of the State of Louisiana were a bar to the maintenance of the complainants' cause of action.

XXIX. In failing to hold that the Statutes of Limitations of the States of Louisiana and the State of New York constituted no bar to the maintenance of complainants' cause of action.

989 XXX. In failing to hold that the defendant Texas & Pacific Railway Company is an express trustee for the benefit of the complainants and the payment of the bonds held by them out of the proceeds of the said land grant, and that the Statutes of Limitations of New York and Louisiana were no bar to complainants' cause of action.

990 XXXI. In failing to hold that the defendant Texas & Pacific Railway Company became possessed of the lands, and proceeds thereof, granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company as aforesaid, and by it conveyed in trust to the Union Trust Company as Trustee, for the purpose of securing its bonds held by the complainants, with full notice of the said deed of trust and the rights of the complainants and charged with an implied trust through its ownership and dealings with said trust fund, viz: the said lands and proceeds thereof, for the benefit of complainants, and by reason of its concealment of the fact that it had become possessed of the said fund, and complainants had no knowledge thereof until the year 1908, the Statutes of Limitations of New York and Louisiana are not a bar to the complainants' cause of action.

XXXII. In holding that laches as would defeat the cause of action could be imputed to complainants.

XXXIII. In failing to grant complainants a decree against defendant The Texas & Pacific Railway Company, declaring the trust deed of September 4, 1872, a first lien on the right of way granted by Act of Congress March 3, 1871, to the New Orleans, Baton Rouge & Vicksburg Railroad Company and for a payment by defendant of the bonds and interest, held by the complainants and secured by said deed of trust. 991

XXXIV. In dismissing complainants' bill and decreeing the costs to be paid by him in favor of the defendant Texas & Pacific Railway Company. 992

WHEREFORE complainants-appellants pray that said decree be reversed and that said District Court for the Southern District of New York be ordered to enter a decree reversing the decision of the lower Court in said cause.

KING & OSBORN
Attorneys for Complainants-Appellants.

994

Order Allowing an Appeal.

DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

DAVID J. WALLER, JR. and LEVI
E. WALLER Trustees, &c.
Complainants

AGAINST

995 THE TEXAS & PACIFIC RAIL-
WAY COMPANY NEW ORLEANS
PACIFIC RAILROAD COMPANY
and UNION TRUST COMPANY,
of New York
Defendants.

E. 10—209

On motion of King & Osborn, solicitors and
counsel for complainants, it is hereby

996

ORDERED that an appeal to the United States
Circuit Court of Appeals for the Second Circuit,
from the decree heretofore filed and entered herein,
be, and the same is hereby allowed, and that a
certified transcript of the record, testimony, ex-
hibits, stipulations, and all proceedings be forth-
with transmitted to said United States Circuit
Court of Appeals for the Second Circuit. It is
further

ORDERED that the bond on appeal be fixed at the
sum of \$250.00

Dated, February 26th 1915.

WALTER EVANS
Judge.

Citation.

997

By the Honorable WALTER EVANS one of the Judges
of the District Court of the United States for
the Southern District of New York, in the
Second Circuit.

TO THE TEXAS & PACIFIC RAILWAY COMPANY.
GREETING

YOU ARE HEREBY CITED and admonished to be and
appear before a United States Circuit Court of
Appeals for the Second Circuit, to be holden at the
Borough of Manhattan in the City of New York,
in the District and Circuit above named, on the 998
27th day of March 1915, pursuant to an appeal
filed in the Clerk's Office of the District Court of
the United States for the Southern District of
New York, wherein David J. Waller, Jr. and Levi
E. Waller, Trustees ec are appellants and you are
Respondent to show cause, if any they be, why the
Decree in said appeal mentioned should not be
corrected and speedy justice should not be done in
that behalf.

GIVEN UNDER MY HAND at the Borough of Man-
hattan, in the City of New York, in the District 999
and Circuit above named, this 26th day of Febru-
ary, in the year of our Lord One Thousand Nine
Hundred and fifteen, and of the Independence of
the United States the One Hundred and Thirty-
ninth.

WALTER EVANS

Judge of the District Court of the United
States for the Southern District of
New York, in the Second Circuit
sitting by designation.

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Stipulation.**DISTRICT COURT OF THE UNITED STATES****FOR THE SOUTHERN DISTRICT OF NEW YORK.**

DAVID J. WALLER, and ano.
 etc., etc.,
 Complainants,

AGAINST

1001 THE TEXAS & PACIFIC RAILWAY
 COMPANY,
 Defendant.

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true transcript of the record of the said District Court in the above entitled cause as agreed on by the parties.

Dated, New York, March 29, 1913.

KING & OSBORN,
 Solicitors for Complainants.

PIERCE & GREER,
 Solicitors for Defendant.

1002

Clerk's Certificate.

1003

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

DAVID J. WALLER *et al.*, etc.,
Complainants,

vs.

THE TEXAS AND PACIFIC RAIL-
WAY CO.,
Defendants.

1004

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled cause, as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the Seal of the said Court, to be hereunto affixed at the City of New York, in the Southern District of New York the day of , in the year of 1005 our Lord One thousand nine hundred and fifteen, and of the Independence of the said United States, the one hundred and thirty-ninth.

ALEX GILCHRIST, JR.,
Clerk.

[SEAL.]

1006

Opinion.

IN THE UNITED STATES DISTRICT COURT,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

DAVID J. WALLER, JR., Trustee,
etc.,
Plaintiff,

vs.

Eq. 10-209

1007 THE TEXAS AND PACIFIC RAIL-
COMPANY,
Defendant.

The time at our disposal affords opportunity only for the very condensed statement which follows, wherein we shall omit all details except those necessary to an understanding of the one essential ground upon which we shall base our judgment. Many other propositions were indeed very ably and elaborately discussed by the learned counsel, but we shall confine ourselves to that one of the defenses upon which we think our decision must turn.

1008 On September 4th, 1872, the New Orleans, Baton Rouge & Vicksburg Railroad Company, a Louisiana corporation created in 1869, and which, for convenience, we shall speak of as the Baton Rouge Company, executed a deed of trust to the Union Trust Company of New York to secure the payment of \$12,000,000 of its 30-year bonds, each of the denomination of \$1,000, the principal of which to become due at the end of thirty years, namely, September 1, 1902, coupons being attached to each bond, whereby the maker of the bond agreed to pay interest semi-annually until the principal was due.

By this deed of trust (which we shall call the mortgage) the Baton Rouge Company conveyed to the trustee named all of its property including certain conditional interest in lands granted to it by Congress under the Act of 1871, to aid in the construction of a railroad from New Orleans to Vicksburg. Only 1500 of these bonds (aggregating \$1,500,000) were sold or issued, and of them nearly all were taken up in some way long before their maturity. What was done with the proceeds or how some of them were taken up in no way appears from the testimony, though it is not contended by the plaintiff that any part of the proceeds of those bonds was applied by anybody to the construction of the railroad afterwards built by those who succeeded the Baton Rouge Company, which latter Company never did anything towards actually perfecting the land grant, inasmuch as it appears only to have filed what was regarded as an insufficient map of its general location in the office of the Secretary of the Interior at Washington. The plaintiff's intestate, in due course, for value and before their maturity, became the owner and holder of the thirty bonds described in the bill, each of them being one of those issued under the mortgage referred to, and each being for the sum of \$1,000.

Under date of January 5th, 1880, the Baton Rouge Company entered into an agreement in writing with the New Orleans Pacific Railroad Company, which we shall call the New Orleans Company, and which was another Louisiana corporation created in 1875. The language of that agreement was as follows:

"This indenture, made the fifth day of January, one thousand eight hundred and eighty, between the New Orleans, Baton Rouge and Vicksburg Railroad Company, a corporation created and existing under and by virtue of a special act of the Legislature

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of the State of Louisiana, approved December 30th, 1869, party of the first part, and The New Orleans Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the State of Louisiana, party of the second part:

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“WITNESSETH: That the said party of the first part, for and in consideration of the sum of one dollar lawful money of the United States of America to it in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and of other good and valuable considerations, has remised, released and quit claimed and by these presents does remise, release and quit claim unto the said party of the second part and to its successors and assigns forever, all the right, title and interest of said party of the first part, its successors or assigns of, in or to a certain grant of public lands granted to the said party of the first part by an Act of the Congress of the United States, approved March 3, 1871, and entitled ‘An Act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes’, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profit thereof; to have and to hold and singular the above mentioned and described premises, together with the appurtenances unto the sad party of the second part to its successors and assigns forever.

IN WITNESS WHEREOF, the said party of 1015
the first part hath caused its corporate seal
to be hereunto affixed, and these presents
to be signed by its President and Secretary
the day and year first above written.

W. H. BARNUM, President

WM. M. BARNUM, Secretary."

Nearly eleven years after the issuance of the
bonds described in the bill, namely, in April, 1883,
and after the construction of the railroad by
agencies other than that of the Baton Rouge Com-
pany, the New Orleans Company, for purposes
therein recited, executed to John F. Dillon and 1016
Henry M. Alexander a deed of trust covering,
among other things, the Baton Rouge Company's
possible interest in the property referred to in the
agreement which we have just copied. This last
deed of trust contained a clause as follows: "And
whereas the New Orleans, Baton Rouge and Vicks-
burg Railroad Company has transferred and as-
signed its right to the said land grant to the said
New Orleans Pacific Railway Company, which said
last mentioned Company has accepted the same
without, however, assuming or becoming liable for
any of the debts, obligations, claims or charges of
the New Orleans, Baton Rouge & Vicksburg Rail- 1017
road Company". There was a consolidation of the
New Orleans Company and the Texas Pacific Rail-
road Company, from which resulted the defendant,
the Texas & Pacific Railway Company, and the
latter Company became bound to pay all the then
existing indebtedness of the New Orleans Com-
pany, though, unless inferentially, it did not be-
come bound to pay those of the Baton Rouge Com-
pany. And here it may be important to recall
that the land grant lands, while in any way under
the control of the Baton Rouge Company, had in
no manner contributed to the construction of the

1018 railroad itself. Indeed, the Baton Rouge Com-
pany had not paid and never did pay to the
United States even the expenses of the survey
of those lands, and so entirely nominal had
become any claim of that company to the land
grants lands that by the Act of February 8,
1887 (24 Stats. 391) Congress forfeited the grant
to the Baton Rouge Company and confirmed
the title of the New Orleans Company. In these
ways the land may have become liable for the debts
of the New Orleans Company and the Texas &
Pacific Company, but we have not been able to
see how it can be inferred from any statutory pro-
1019 vision or any agreement in writing that any trust
upon that property could or did expressly or im-
pliedly result for the payment of any of the debts
of the Baton Rouge Company. While indeed my
sympathies are with the plaintiff as the holder for
value of the bonds which are the subject of this
action, neither the quit-claim deed we have copied
nor any statute nor any conjunction of both agree-
ment and statute have enabled us to see how any
express trust ever existed in plaintiff's favor or in
favor of his decedent, except that created by the
mortgage to the Union Trust Company as trustee,
the bounds and limitations of which are set forth
1020 in the deed itself, which instrument, as we have
seen, is in effect nothing more or less than a mort-
gage, and to be treated as such. If, as distinguished
from that, there exists now or ever existed any
trust, it must necessarily be one which arises *ex-
maleficio* or by mere implication and construction.
To say least, it is very difficult to see how any trust
apart from the lien created by the mortgage of
September, 1872, ever arose or could have arisen.
Of course, the lien or trust of that mortgage rested
upon the property of the Baton Rouge Company
embraced in the mortgage, but that was neither
more or less than an ordinary mortgage lien only.

If that lien still exist by virtue of that mortgage ¹⁰²¹ it may, of course, be enforced in a direct action in a court having jurisdiction, namely, a court, either State or Federal, sitting in Louisiana. A suit to subject that property to the mortgage must necessarily be brought and prosecuted in the State of the *situs* of the property and not elsewhere. The *situs* of that real estate is not here, and this action is not that sort of suit. This suit seeks to enforce the collection of the mortgage debt, not indeed from the property mortgaged but from another corporation now alleged to be personally liable for it. We have concluded that any such liability, if it exist at all, must be one that is secondary in character and resulting from some trust *ex-delicto* to be implied (if such implication can arise) from some state of fact shown, and not upon any direct undertaking by the New Orleans Company or the defendant to pay the debt of another, to wit, the Baton Rouge Company. This statement will indicate our view to be that our decision must turn upon either one or both of the affirmative defenses made by the Texas & Pacific Railway Company (the only defendant before the Court, the others having long ago been dismissed from the cause) and which defenses may compendiously be referred to, the first as that of the statute of limitations, and the second ¹⁰²² as that which imputes to the plaintiff such laches in bringing his action as should prevent the chancellor from granting relief. ¹⁰²³

And first, as to the Statute of Limitations.

The bonds described in the bill matured in September, 1902. This action was commenced on May 7th, 1913, more than ten years after the bonds became due. The principal and interest would aggregate at this time over \$104,000.

It is well settled that the law of the forum is that which governs where the statute of limitations is invoked. The forum being New York, the statute

1024 of that State is the one to govern in equity causes as well as in actions at law. *Lewis vs. Marshall*, 5 Peters 470, and see also *O'Brien vs. Wheelock*, 184 U. S. 450, 493.

The applicable provisions of the law of New York are embraced in the following sections and parts of sections of the Code of Civil Procedure, to wit: Section 380 is as follows:

"The following actions must be commenced within the following periods, after the cause of action has accrued."

"Section 381. Within twenty years:

1025 An action upon a sealed instrument.

But where the action is brought for breach of a covenant of seizin, or against incumbrances, the cause of action is, for the purposes of this section only, deemed to have accrued upon an eviction, and not before."

"Section 382. Within six years:

1. An action upon a contract obligation or liability express or implied; except a judgment or sealed instrument.

2. An action to recover upon a liability created by statute; except a penalty or forfeiture."

1026 "Section 388. An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues."

"Section 390a. Where a cause of action arises outside of this State, an action cannot be brought, in a court of this state, to enforce said cause of action, after the expiration of the time limited by the laws of the state or country where the cause of action arose, for bringing an action upon said cause of action, except where the cause of action originally accrued in favor of a resident of this State. Nothing in this act contained

shall affect any pending action or proceeding." 1027

The court in this connection must avail itself also of the judicial knowledge imputed to it respecting the provisions of the Louisiana Code. That Code seems to fix the period of prescription (or, as we call it, the period of limitation) at not over ten years—that is to say, a suit upon a negotiable instrument is prescribed in five years after maturity, and a suit upon a mortgage is prescribed at ten years after it becomes enforceable. See Merri-
 rick's Revised Code of Louisiana. If a suit brought in Louisiana to enforce a mortgage upon 1028
 real estate situated there is prescribed by ten years' delay after the cause of action has arisen, it would seem that the provisions of Sections 390a of the New York Code might certainly be applicable to the situation with which we are confronted. This action not being against the mortgagor nor against the maker of the bonds, but against a third party who is a stranger to both, is not a suit upon the mortgage nor one upon the bonds in any direct way, nevertheless both the mortgage and the bonds are in a large sense, though incidentally, the basis of the action, for without them the plaintiff could not succeed. As the claim against the defendant, the 1029
 Texas and Pacific Railway Company, must be based upon some implication to be drawn from facts *aliunde*, the mortgage and the bonds of the Baton Rouge Company, we incline strongly to think that Section 382 of the New York Code fixes the limitation governing this case, or if it does not, then that Section 388 does, and this, too, notwithstanding the provisions of Section 410 of the New York Code, the second clause of which does not, as we think, apply to a case like this, but must be confined to those examples of express trusts explicitly named therein. We have carefully examined the cases of

1030 Northern Pacific Railway Co. *vs.* Boyd, 228 U. S. 48, and Angle *vs.* Chicago, etc., Railway Co., 151 U. S. 1, but can not find that they are controlling here, nor that the statute of limitations was either pleaded or discussed by the court in either of them.

We need give little time to a discussion of the defense of laches, though it is quite difficult to find in the testimony anything to justify or excuse the long delay in bringing the action, especially as the bonds, on their face, referred to the mortgage which was recorded in the proper offices in Louisiana whereby notice was given to all holders. We much incline to think that this defense also should be
1031 sustained, but prefer rather to base our decree upon the statute of limitation. As to the defense of laches we think consideration may helpfully be given to O'Brien *vs.* Wheelock, 184 U. S. 450, 493.

The court, during the trial, was purposely very liberal in the admission of testimony, especially when offered by the plaintiff, preferring to be free to give it any weight it might be entitled to rather than to exclude it altogether. But while dealing with the question of admissibility in that spirit, some few items of proffered testimony seemed to be so remote as to fall outside of any reasonable limit.

We think it results that the bill must be dismissed with costs and a decree accordingly may be
1032 prepared and submitted.

WALTER EVANS.

Feb. 23, 1915.

(Endorsed)—U. S. District Court, S. D. of N. Y.,
Filed Feb. 23, 1915.

At a Stated Term of the United States District Court for the Southern District of New York, Held in the Court Room Thereof, in the City of New York on the 6th Day of May, 1915.

Hon. Julius M. Mayer, U. S. District Judge.

DAVID J. WALLER and Ano., Trustees, etc., Complainants,
 against
 THE TEXAS AND PACIFIC RAILWAY COMPANY et al., Defendants.

On the annexed consent and on motion of King & Osborn, Esqs., Solicitors for Complainants-Appellants, it is

Ordered that the provisions of Equity Rule 75 be and the same hereby are waived and that the Clerk may certify the transcript of record on appeal without having the statement of the evidence approved and without requiring any præcipe.

J. M. MAYER,
 U. S. District Judge.

We hereby consent to the entry of the foregoing order.

Dated, N. Y. May 5, 1915.

KING & OSBORN,
Solicitors for Compl't. App'tt.
 PIERCE & GREER,
Solicitors for Def't, App'lees.

Stipulation.

District Court of the United States for the Southern District of New York.

DAVID J. WALLER and Ano., etc., etc., Complainants,
 against
 THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled cause as agreed on by the parties.

Dated, New York, March 29, 1915.

KING & OSBORN,
Solicitors for Complainants.
 PIERCE & GREER,
Solicitors for Defendant.

Clerk's Certificate.

District Court of the United States for the Southern District of
New York.

DAVID J. WALLER et al., etc., Complainants,

vs.

THE TEXAS AND PACIFIC RAILWAY CO., Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled cause, as agreed on by the parties.

In testimony whereof, I have caused the Seal of the said Court, to be hereunto affixed at the City of New York, in the Southern District of New York the — day of —, in the year of our Lord One thousand nine hundred and fifteen, and of the Independence of the said United States, the one hundred and thirty-ninth.

[SEAL.]

ALEX. GILCHRIST, JR., *Clerk.*

United States Circuit Court of Appeals for the Second Circuit,
October Term, 1915.

Argued November 17, 1915. Decided December 14, 1915.

Before Lacombe, Coxe, and Ward, Circuit Judges.

No. 52.

DAVID J. WALLER, JR., and LEVI E. WALLER, Trustees under the Last Will and Testament of David J. Waller, Deceased, in Their Own Behalf, and in Behalf of All Other Bondholders Secured by a Deed of Trust, Made by the New Orleans, Baton Rouge and Vicksburg Railroad Company, Dated the 4th Day of September, 1872, Complainants-Appellants,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY, NEW ORLEANS Pacific Railroad Company, and the Union Trust Company of New York, Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from the decree of the District Court for the Southern District of New York which dismissed the bill in a suit commenced by certain bond holders holding thirty bonds of \$1,000 each issued by the New Orleans, Baton Rouge & Vicksburg Railroad Company in September 1872 and payable September 1, 1902. These bonds

were secured by a deed of trust by the Baton Rouge Company to the Union Trust Company of New York upon all of the said Baton Rouge Railroad's property including its right of way and land grant given it by Congress.

W. Russell Osborn, William A. Milliken, David Bennett King,
For Appellants:

Thomas J. Freeman, Lawrence Greer, F. C. Nicodemus, Jr., for
Appellees.

FOX, J.:

The facts are stated in the opinion of Judge Evans and need not be repeated here at length. The suit is brought upon thirty bonds issued by the New Orleans, Baton Rouge & Vicksburg Railroad Company in September 1872, payable thirty years from date—September 1, 1902—and secured by a trust deed from the Railroad Company to the Union Trust Company of New York upon all its property including its right of way and the land grant given the Baton Rouge Company by Congress. The proposition is somewhat startling that the holder of the obligations of one corporation secured by a mortgage on its property may maintain a suit forty years after the date of such obligation and based thereon against another Corporation not a party thereto. The Texas & Pacific Company has not in terms pleaded the statute of limitation of New York and Louisiana but they have clearly presented the issue of laches and delay by charging that the complainants have been "guilty of such laches in the premises that no complaint may now be made in respect of the said bonds."

This being a suit in equity it is not essential that the statute should be specifically pleaded. *Harpening v. Dutch Church*, 16 Peters, 455; *Badger v. Badger*, 2 Wall. 87.

But, in view of the facts, the defense of laches and unreasonable delay is always available and has we think been clearly established. The bonds matured September 4, 1902, but no suit was commenced until May 7, 1913, more than ten years thereafter when the period of limitation in both Louisiana and New York had expired. All the facts now relied on were known or could have been ascertained if any effort with that end in view had been undertaken.

The attitude of the owners of these bonds so far as appears from the record has been one of supineness and indifference during the entire period prior to the commencement of this action.

As was said by the Supreme Court:

"The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief."

O'Brien v. Wheelock, 184 U. S. 450, 493.

We are of the opinion that the complainants waited too long before commencing the action.

The decree is affirmed with costs.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building, in the City of New York, on the 24th Day of December, One Thousand Nine Hundred and Fifteen.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges.

DAVID J. WALLER, JR., and Another, as Trustee, etc., Complainant-Appellants,

vs.

TEXAS & PACIFIC RAILWAY COMPANY et al., Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

E. H. L.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Endorsed: United States Circuit Court of Appeals, Second Circuit. D. J. Waller vs. Texas & Pacific Ry. Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 24, 1915. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

DAVID J. WALLER, JR., and LEVI E. WALLER, Trustees under the Last Will and Testament of David J. Waller, Deceased, in Their Own Behalf, and in Behalf of All Other Bondholders Secured by a Deed of Trust, Made by the New Orleans, Baton Rouge and Vicksburg Railroad Company, Dated the 4th Day of September, 1872, Complainants-Appellants,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY, NEW ORLEANS PACIFIC Railroad Company, and the Union Trust Company of New York, Defendants-Appellees.

To the Honorable E. Henry Lacombe, Alfred C. Coxe, and Henry G. Ward, Circuit Judges:

The above named David J. Waller, Jr. and Levi E. Waller, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 24 day of December, 1915, do hereby appeal from

said decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States, sitting at Washington, D. C., under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security required of him be made.

DAVID BENNETT KING,
W. RUSSELL OSBORN,
Solicitors for Complainants.

Appeal allowed upon giving bond as required by law for the sum of \$250.

E. HENRY LACOMBE,
U. S. Circuit Judge.

United States Circuit Court of Appeals for the Second Circuit.

DAVID J. WALLER, JR., and LEVI E. WALLER, Trustees under the Last Will and Testament of David J. Waller, Deceased, in Their Own Behalf, and in Behalf of All Other Bondholders Secured by a Deed of Trust, Made by the New Orleans, Baton Rouge and Vicksburg Railroad Company, Dated the 4th Day of September, 1872, Complainants-Appellants,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY, NEW ORLEANS Pacific Railroad Company, and the Union Trust Company of New York, Defendants-Appellees.

And now, on this 30th day of December 1915 come the Complainants, David J. Waller, Jr. and Levi E. Waller, Trustees, by their solicitors, David Bennett King and W. Russell Osborn, and say that the decree entered in this cause on the 24th day of December 1915, is erroneous and unjust to complainants, because the Court erred:

I. In holding that while "the Texas & Pacific Railway Company has not pleaded the Statute of Limitations of New York and Louisiana they have clearly presented the issue of laches and delay by charging that the complainants have been guilty of such laches in the premises that no complaint may now be made in respect of the said bonds;" and that "this being a suit in equity it is not essential that the Statute should be specifically pleaded."

II. In holding that "no suit was commenced until May 7, 1913, more than ten years after the maturity of the bonds, and when the period of limitation in both Louisiana and New York had expired."

III. In holding that "all the facts now relied on were known or

could have been ascertained if any effort with that end in view had been undertaken."

IV. In holding that "the attitude of the holders of these bonds, so far as appears from the record, has been one of supineness and indifference during the entire period prior to the commencement of this action."

V. In holding that "the proposition is somewhat startling that the holder of the obligation of one corporation secured by a mortgage on its property may maintain a suit forty years after the date of such obligation and based thereon against another corporation not a party thereto."

VI. In failing to hold that the suit brought by the complainants, David J. Waller, Jr., and Levi E. Waller, Trustees, in the United States District Court at New Orleans Louisiana, against the defendants herein, in the year 1908, to collect these bonds sued on in this case, and which suit is still pending there, suspended the running of any Statute of Limitations as to complainants, and relieved them of any charge of laches.

VII. In failing to hold that the defendant, being a foreign corporation, having failed to state in its answer or present any evidence that it had complied with the Statute of New York, as set forth in § 401 and § 430 of the Code, can not avail itself of the Statute of Limitations of New York, nor can the Court give it the benefit of the same.

VIII. In failing to hold that the Act of Congress, March 3, 1871, granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company, a title in fee to the right of way and the alternate sections of land, subject only to forfeiture by an Act of Congress or the Judicial Department of the United States.

IX. In failing to hold that, as shown by the evidence, the filing of its map of general route with the Land Office and its acceptance by the Secretary of the Interior and his withdrawal of the lands from entry, was a compliance with the Act of Congress and vested a perfect title in fee to the right of way and alternate sections of land, subject only to forfeiture by an act of Congress or the Judicial Department.

X. In failing to hold that the trust deed executed by the New Orleans, Baton Rouge & Vicksburg Railroad Company September 4, 1872, was valid and binding on the lands granted by § 22 of the Act of Congress of March 3, 1871, both the right of way and the alternate sections of land on each side of said right of way.

XI. In failing to hold that by virtue of the conveyance of January 5, 1881, the said land grant and the right of way therein described were conveyed to the new Orleans Pacific Railroad Company, subject to the deed of trust executed by the New Orleans, Baton Rouge & Vicksburg Railroad Company, to the Union Trust Company as trustee, dated September 4, 1872.

XII. In failing to hold that the said conveyance of January 5, 1881, and the conveyance of June 20, 1881, made by the New Orleans Pacific Railroad Company to the defendant Texas & Pacific Railway Company, did effect the merger and consolidation

of the New Orleans, Baton Rouge & Vicksburg Railroad Company, with the defendant Texas & Pacific Railway Company.

XIII. In failing to hold that by the terms of the instrument of June 20, 1881, executed and delivered by the New Orleans Pacific Railroad Company to the defendant Texas & Pacific Railway Company, and by the deed of trust or mortgage, and the deed of trust and mortgage supplementary thereto, executed by the New Orleans Pacific Railroad Company to Dillon and Alexander, as trustees, and dated respectively April 17, 1883, and January 5, 1884, the defendant Texas & Pacific Railway Company, as the owner and holder of substantially all the capital stock of the New Orleans Pacific Railroad Company, received the benefits and proceeds of the said land grant charged with the express trust created by the deed of trust dated September 4, 1872, to secure the complainants' bonds.

XIV. In failing to hold that the said land grant and right of way described in the deed of trust given to secure the complainants' bonds and dated September 4, 1872, was a trust fund in the possession of the defendant Texas & Pacific Railway Company, charged with an express trust for the application of the proceeds thereof to the payment of the complainants' bonds.

XV. In failing to hold that pursuant to the Act of Congress approved March 3, 1871, the defendant Texas & Pacific Railway Company became liable, as a railroad merged and consolidated with the New Orleans, Baton Rouge & Vicksburg Railroad Company and the New Orleans Pacific Railroad Company, as in said Act provided, to pay certain obligations of the New Orleans Baton Rouge & Vicksburg Railroad Company, viz: complainants' bonds.

XVI. In failing to hold that under the terms of the Act of Congress approved February 8, 1887, the defendant assumed and became liable to pay the obligations of the New Orleans, Baton Rouge & Vicksburg Railroad Company, viz: the bonds held by these complainants in accordance with the provisions of said last named Act, as construed by the Commissioner of the Land Office, on the 5th day of January, 1889, upon the protest of one Babcock against the patenting of lands by the Government of the United States unto the New Orleans Pacific Railroad Company.

XVII. In failing to hold that the defendant Texas & Pacific Railway Company merged and consolidated with itself the New Orleans, Baton Rouge & Vicksburg Railroad Company and the New Orleans Pacific Railroad Company, in accordance with the said Act of Congress of 1871, the said conveyance of January 5, 1881, the conveyance of June 20, 1881, and the provisions of the said Act of 1887, and the decisions of the Commissioner of the Land Office, dated January 5, 1889.

XVIII. In failing to hold that the report made by the defendant Texas & Pacific Railway Company to the General Commissioner of the Land Office, dated September 23, 1911 was a conclusive and binding admission by the said defendant that it has since 1881 been consolidated with the said New Orleans, Baton Rouge & Vicks-

burg Railroad Company and the New Orleans Pacific Railroad Company.

XIX. In failing to hold that through the medium of conveyances or deed of trust made by the New Orleans Pacific Railroad Company after its consolidation with the defendant Texas & Pacific Railway Company to Dillon and Alexander, as trustees, dated April 17, 1883, and January 5, 1884, and the provisions thereof, that the bonds secured by the said deeds of trust be delivered to the New Orleans Pacific Railroad Company, and that said bonds be exchangeable for lands, said defendant became possessed of and appropriated to itself lands granted by Congress to the New Orleans, Baton Rouge & Vicksburg Railroad Company and by said Company conveyed to the Union Trust Company, as trustee, to secure the payment of the complainants' bonds thereunder, pursuant to said deed of trust dated September 4, 1872.

XX. In failing to hold upon all the facts proven in this cause, that the filing of the Articles of Agreement between the New Orleans Pacific Railroad Company and the defendant Texas & Pacific Railway Company, dated June 20, 1881, and filed in the office of the Secretary of State of the State of Louisiana at Baton Rouge, Louisiana, was insufficient to charge the complainants with notice thereof.

XXI. In failing to hold that the defendant Texas & Pacific Railway Company fraudulently concealed the fact that it was the owner of and merged or consolidated with the New Orleans Pacific Railroad Company since the year 1881, and through such ownership and by provisions of the conveyances of 1883 and 1884 to Dillon and Alexander, trustees, it received and appropriated to itself the lands or the proceeds of the lands described in the deed of trust or mortgage dated September 4, 1872, and made by the New Orleans, Baton Rouge & Vicksburg Railroad Company to the Union Trust Company.

XXII. In failing to hold that the lands granted by this said Act approved March 3, 1871, to the New Orleans, Baton Rouge & Vicksburg Railroad Company, constituted a trust fund for the payment of the bonds held by the complainants, and the defendant Texas & Pacific Railway Company became possessed thereof, charged with an express trust to apply said fund to the payment of the bonds held by the complainants, and was and is subject to all duties, obligations and liabilities of an express trustee for the complainants with respect to same.

XXIII. In failing to hold that the defendant Texas & Pacific Railway Company, as the owner of the New Orleans Pacific Railroad Company, was bound by and acquiesced in the decision of the Commissioner of the Land Office, dated the 5th day of January, 1889.

XXIV. In failing to hold that the patents to lands included in said grant thereafter issued in the name of the New Orleans Pacific Railroad Company were upon the express condition that the defendant pay the obligations of the New Orleans, Baton Rouge &

Vicksburg Railroad Company, particularly its bonds held by these complainants, in accordance with said last named decision.

XXV. In failing to hold that the defendant Texas & Pacific Railway Company is now estopped to claim that it is not liable for, or should not pay the bonds held by the complainants, out of the proceeds and benefits received from the said lands granted by Congress to the New Orleans, Baton Rouge & Vicksburg Railroad Company by the Act of March 3, 1871.

XXVI. In failing to hold that the covenants and provisions contained in the deed of trust made by the New Orleans, Baton Rouge & Vicksburg Railroad Company to the Union Trust Company, as trustee, dated September 4, 1872, ran with and were charged upon the lands described therein, in the possession of both the New Orleans Pacific Railroad Company and the defendant Texas & Pacific Railroad Company, and that by reason of its acceptance of possession thereof, became and is an express trustee charged with the performance and provisions of said covenants, and provisions in said deed of trust contained for the benefit of these complainants.

XXVII. In failing to hold that the defendant Texas & Pacific Railroad Company, through its ownership of the New Orleans Pacific Railroad Company, the grantee of the said land grant, is estopped to question the validity of the title to said lands in its grantee the New Orleans, Baton Rouge & Vicksburg Railroad Company.

XXVIII. In holding that the Statute of Limitations of the State of New York is a bar to the complainants' cause of action.

XXIX. In holding that the Statutes of the State of Louisiana are a bar to the maintenance of the complainants' cause of action.

XXX. In failing to hold that the defendant Texas & Pacific Railway Company is an express trustee for the benefit of the complainants and for the payment of the bonds held by them, out of the proceeds of the said land grant, and that the Statutes of Limitations of New York and Louisiana were no bar to complainants' cause of action.

XXXI. In failing to hold that the defendant Texas & Pacific Railway Company became possessed of the lands and proceeds thereof, granted to the New Orleans, Baton Rouge & Vicksburg Railroad Company as aforesaid, and by it conveyed in trust to the Union Trust Company as trustee, for the purpose of securing its bonds held by the complainants, with full notice of the said deed of trust and the rights of the complainants and charged with an express trust through its ownership and dealings with said trust fund, viz: the said lands and proceeds thereof, for the benefit of complainants, and by reason of its concealment of the fact that it had become possessed of the said fund, and complainants had no knowledge thereof until the year 1908, the Statutes of Limitations of New York and Louisiana are not a bar to the complainants' cause of action.

XXXII. In failing to hold that the suit brought by complainants, David J. Waller, Jr., and Levi E. Waller, trustees, in the United States District Court at New Orleans, Louisiana, against

the defendants herein, in the year 1908, to collect these bonds sued on in this case, and which suit is still pending there, suspended the running of any statute of limitations as to complainants, and relieved them of any charge of laches.

XXXIII. In failing to hold that the defendant, being a foreign corporation, having failed to state in its answer or present any evidence that it had complied with the Statute of New York, as set forth in § 401 and § 430 of the Code, can not avail itself of the Statute of Limitations of New York, nor can the court give it the benefit of same.

XXXIV. In holding that the complainants have been guilty of laches in delaying the bringing of their suit for the collection of these bonds.

XXXV. In affirming the decree of the District Court dismissing complainants' bill.

Wherefore complainants pray that the said decree be reversed, and the District Court be instructed to enter a decree in favor of complainants against the defendant for the amount of their bonds, coupons and interest.

DAVID BENNETT KING,
W. RUSSELL OSBORN,
Solicitors for Complainants.

(Endorsed:) U. S. Circuit Court of Appeals, Second Circuit. David J. Waller, Jr. and Levi E. Waller, Trustees, etc., Appellants, against Texas & Pacific Railway Company et al., Appellees. Petition for Appeal and Exceptions to Error. King & Osborn, Attorneys for Compl'ts, App'l'ts, 165 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 31, 1915. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

DAVID J. WALLER, JR., and LEVI E. WALLER, Trustees under the Last Will and Testament of David J. Waller, Deceased, in Their Own Behalf, and in Behalf of All Other Bondholders Secured by a Deed of Trust, Made by the New Orleans, Baton Rouge and Vicksburg Railroad Company, Dated the 4th Day of September, 1872, Complainants-Appellants,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY, NEW ORLEANS Pacific Railroad Company, and the Union Trust Company of New York, Defendants-Appellees.

Know all men by these presents, That David J. Waller, Jr. and Levi E. Waller, etc., as principals, and the National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named The Texas and Pacific Railway Company,

New Orleans Pacific Railroad Company and the Union Trust Company of New York, in the sum of Two Hundred and Fifty (\$250.00) dollars, to be paid to the said The Texas and Pacific Railway Company, for the payment of which well and truly to be made, said principals and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed and dated the 5th day of January, 1916.

Whereas, the above named David J. Waller, Jr. and Levi E. Waller, etc., have prosecuted on appeal to the United States Supreme Court to reverse the final decree rendered in the above entitled suit, by the Circuit Court of Appeals for the Second Circuit, on the 24th day of December 1915.

Now, therefore, the condition of this obligation is such, that if the above named David J. Waller, Jr. and Levi E. Waller, etc., shall prosecute said appeal to effect, and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

LEVI E. WALLER, [L. s.]
NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice President.

Attest:

N. V. TYNAN,
Resident Ass't Secretary.

STATE OF PENNSYLVANIA,
County of Luzerne, ss:

On the 6th day of January, 1916, before me personally came the within named Levi E. Waller, etc., to me known, and known to me to be one of the individuals described in and who executed the within bond and he acknowledged that he executed the same.

My commission expires March 3rd, 1917.

R. B. ALEXANDER, [SEAL.]
Notary Public.

Capital \$2,000,000.00.

Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.

STATE OF NEW YORK,
County of New York, ss:

On this 5th day of January one thousand nine hundred and sixteen before me personally came Wm. A. Thompson, known to me to be the Resident Vice-President of the National Surety Company, the corporation described in and which executed the within and foregoing Bond of David J. Waller, Jr. and Levi E. Waller, etc., as a surety thereon, and who, being by me duly sworn, did depose and

say that he resides in the City of New York, State of New York, that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894; that the seal affixed to the within Bond of David J. Waller, Jr. and Levi E. Waller, etc. is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company; that he signed his name thereto by like order and authority as Resident Vice-President of said Company; that he is acquainted with N. V. Tynan and knows him to be the Resident Assistant Secretary of said Company; that the signature of said N. V. Tynan subscribed to said Bond is in the genuine handwriting of said N. V. Tynan, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever by more than the sum of Three Million Five Hundred Thousand (\$3,500,000) Dollars.

That ——— is agent to acknowledge service for said Company in the Judicial District wherein this bond is given.

WM. A. THOMPSON,
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed in my presence this 5th day of January, 1916.

H. E. BENNETT,
Notary Public, &c.
(Officer's Signature, Description and Seal.)

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit. Levi E. Waller & ano., Appellants, vs. The Texas & Pac. Ry. Co., Respondent. Bond on Appeal. King & Osborn, Attorneys for Appellants, 165 Broadway, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 7, 1916. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 369 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of David J. Waller and another, as Trustees, etc., against Texas & Pacific Railway Company, et al. as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern

District of New York, in the Second Circuit, this 8th day of January in the year of our Lord One Thousand Nine Hundred and sixteen and of the Independence of the said United States the One Hundred and fortieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk*.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 1/18/16. A. M. B.]

United States Circuit Court of Appeals for the Second Circuit.

DAVID J. WALLER, JR., and LEVI E. WALLER, Trustees under the Last Will and Testament of David J. Waller, Deceased, in Their Own Behalf, and in Behalf of All Other Bondholders Secured by a Deed of Trust, Made by the New Orleans, Baton Rouge and Vicksburg Railroad Company, Dated the 4th Day of September, 1872, Complainants-Appellants,

against

THE TEXAS AND PACIFIC RAILWAY COMPANY, NEW ORLEANS PACIFIC Railroad Company, and the Union Trust Company of New York, Defendants-Appellees.

Citation.

UNITED STATES OF AMERICA, *ss.*:

To Texas and Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the 31st day of January A. D. 1916. Pursuant to an order allowing an appeal, filed and entered in the Clerk's office of the District Court of the United States for the Southern District of New York from a final decree signed, filed, and entered on the 24th day of December, 1915, in that certain suit, being in Equity No. 10-209, wherein David J. Waller, Jr. and Levi E. Waller, are plaintiffs and you are defendant and appellee, to show cause, if any there be, why the decree rendered against the said appellants as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable E. Henry Lacombe, United States Circuit Judge for the Second Circuit, this 31st day of December and the Independence of the United States, 140th year.

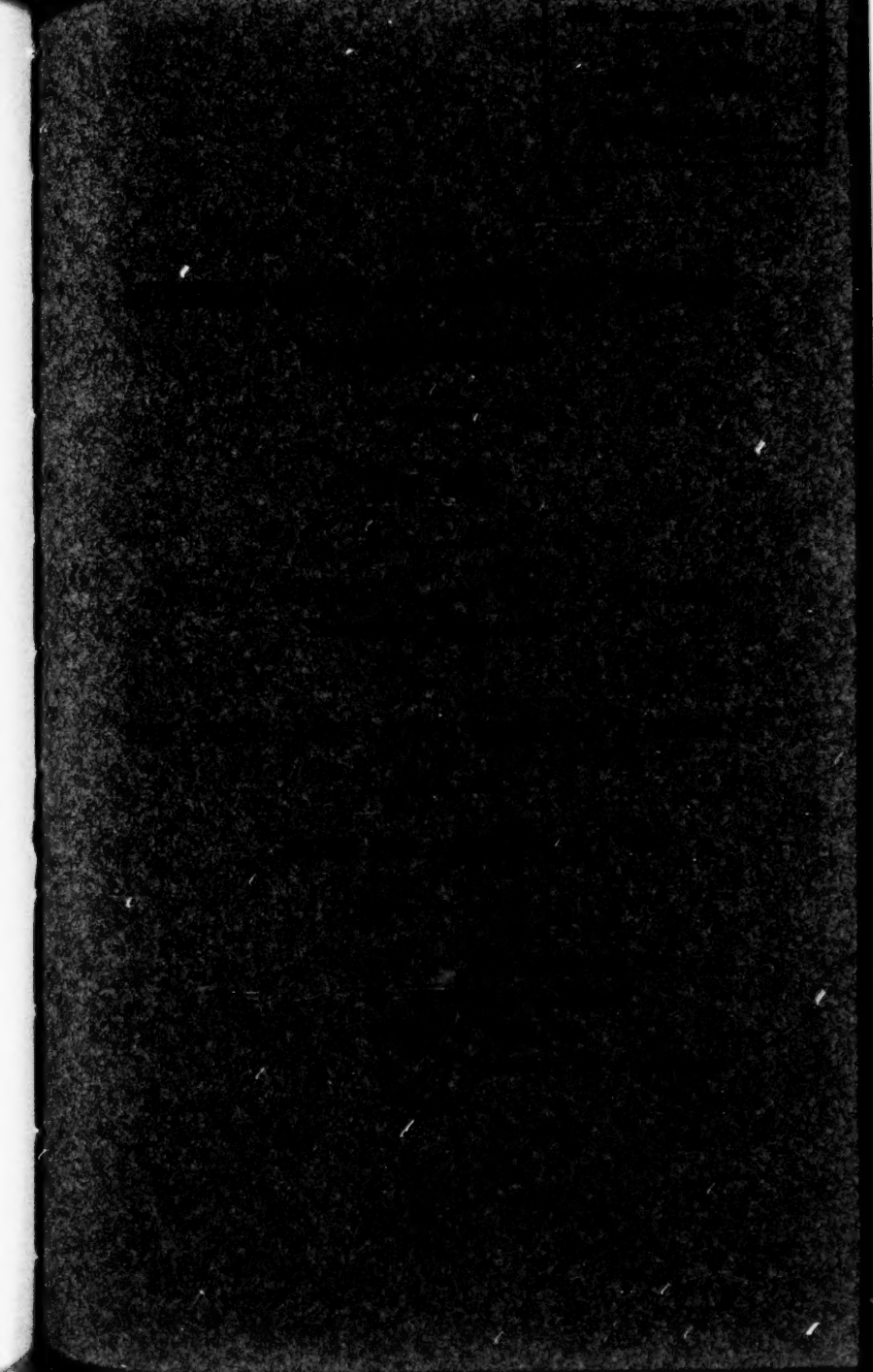
E. HENRY LACOMBE,

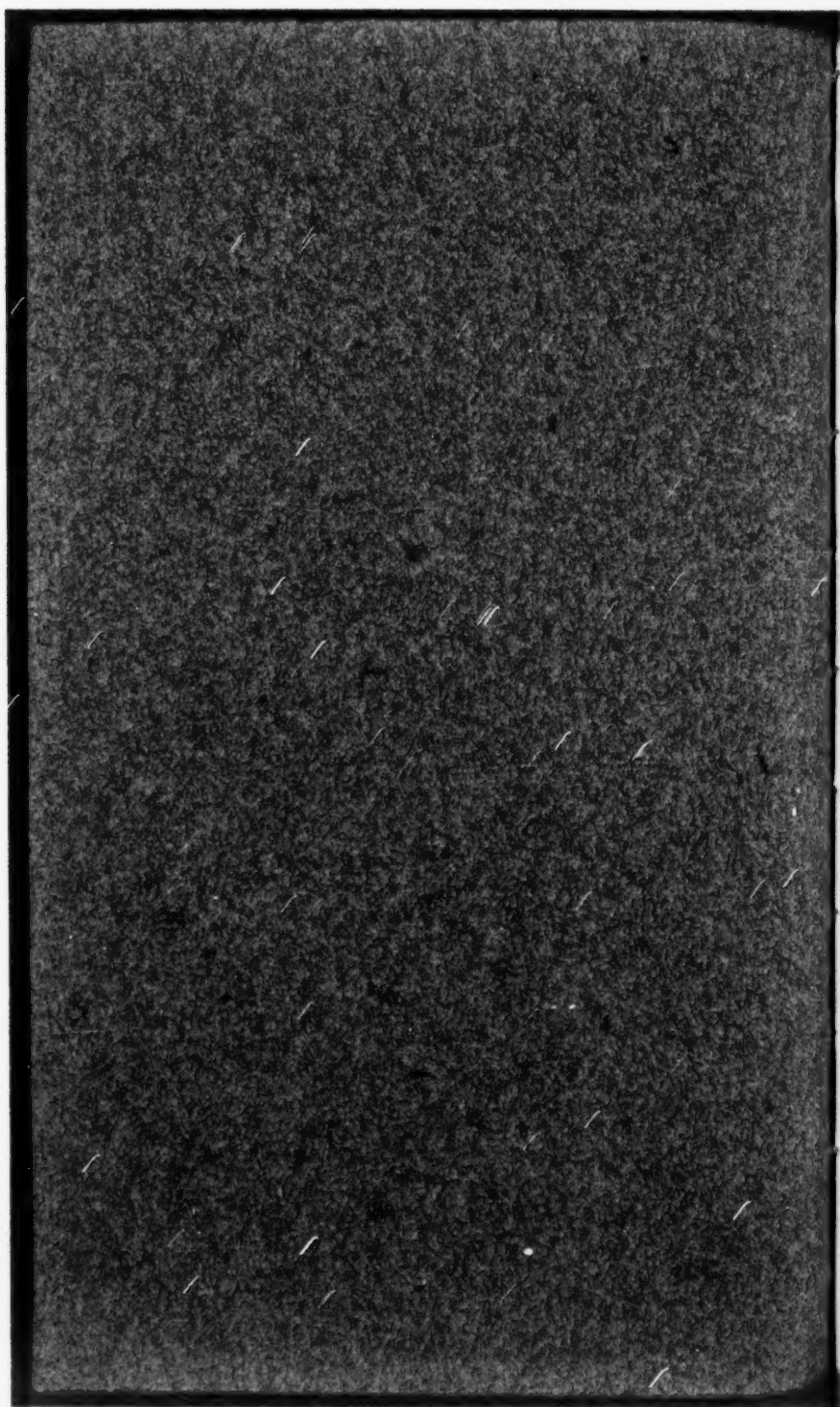
U. S. Circuit Judge for the Second Circuit.

[Endorsed:] U. S. Circuit Court of Appeals, Second Circuit.
David J. Waller, Jr. and Levi E. Waller, Trustees, etc., Appellants,

against Texas & Pacific Railway Co., et al., Appellees. Citation. King & Osborn, Attorneys for Appellants, 165 Broadway, Borough of Manhattan, New York City. Service of a copy of the within citation is this day admitted Dec. 31st, 1915. Pierce & Greer, Solicitors for Def'ts. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 4, 1916. William Parkin, Clerk.

Endorsed on cover: File No. 25,109. U. S. Circuit Court Appeals, 2d Circuit. Term No. 826. David J. Waller, Jr., and Levi E. Waller, trustees under the last will and testament of David J. Waller, deceased, &c., appellants, vs. The Texas & Pacific Railway Company. Filed January 28th, 1916. File No. 25,109.





INDEX.

Page

STATEMENT	1
THE FACTS	6
ASSIGNMENT OF ERRORS.....	34
ANALYSIS OF ARGUMENT.....	35
ARGUMENT	38-98
1. The deed of trust of 1872 was a valid conveyance of the rights granted by the act of March 3, 1871, and the trusts thereby established in favor of the bondholders attached to the specific land constituting the right of way and alternate sections as they were afterwards identified by the definite location and construction of the railroad. The title, as perfected by this identification, and subsequent issuance of patents, and as confirmed by the act of February 8, 1887, related back to the date of the original act, and enured to the benefit of the bondholders as of the date of the deed of trust	38-51
(1) The validity and effect of the deed of trust are determined by the acts of Congress, properly construed	38-40
(2) The subject-matter granted by the act of March 3, 1871, was susceptible of conveyance when the deed of trust was made, its nature in that regard being determined by the act of Congress, and not by the ordinary rules of conveyance.	
Repeated decisions of this court establish that such an act of Congress vests in the grantee a property interest—a title—in the right of way and aid sections, which becomes a title to specific land when the road is located, and that this perfected specific title relates back to the date of the act	40-43
(3) The deed of trust was therefore not a conveyance of property to be acquired, but of property actually existing.....	43

	Page
(4) The act authorized the company to use the granted lands as a basis of credit, as was actually done	44-47
(5) Even if the deed of trust could be regarded as a mortgage of property to be acquired, it would still be supported by the acts of Congress and the decisions of the Federal courts upholding mortgages of that character by railroad companies	48-50
(6) The case affords a clear occasion for applying the equitable doctrine of relation, in construing the acts of Congress, for the protection of the equities of the bondholders.....	50-51
II. The deed of trust was valid under the Louisiana law....	51-55
III. Appellee, which claims title under and through the Baton Rouge Company, is estopped to deny its power to convey the land by way of mortgage and deed of trust....	55-56
IV. The pleadings and evidence show the execution of the trust instrument of 1872 and the issue and non-payment of appellants' bonds.....	56-60
V. The title of the New Orleans Pacific Company, acquired from the Baton Rouge Company in January, 1881, was subject to the trust created for the payment of appellants' bonds	61-62
VI. Appellee and New Orleans Pacific were legally one corporation, so far as this case is concerned. The acts done in the name of the New Orleans Pacific were in law the acts of appellee, and the appellee is responsible therefor	63-70
VII. The right of way and alternate sections were charged with a trust in favor of the bondholders. Appellee, with full knowledge of such trust, obtained possession of all the lands. Appellee thereby took the place of and became the express trustee. Having disposed of the trust property, in substantial accord with the trust, and paid off most of the bonds, it will be compelled in equity to completely perform and pay the remainder of the bonds.....	70-78
VIII. By the merger of the New Orleans Company with appellee the latter became liable to pay the bonds.....	78-81
(1) This is true under the Act of 1871 chartering appellee	78-80
(2) Liability to pay the bonds attaches under the principle of <i>Northern Pacific Ry. Co. vs. Boyd</i> , 228 U. S., 482.....	80-81

INDEX.

iii

Page

IX. The statute of limitations is no bar to this action.....	82-87
(1) The statute of limitations was not relied upon in the answer, and therefore cannot be availed of	82-84
(a) The Federal courts will require limitations to be pleaded, if such is the local law	82-83
(b) Under the New York law limitations must be expressly pleaded.....	83-84
(c) The rule adopted in New York is so general that this court has applied it without reference to State decisions.	84
(2) The statute of limitations is not applicable to an express trust.....	85-86
(3) The period of limitations, if any is applicable, is twenty years.....	86-87
X. Appellants were not guilty of laches.....	88-93
XI. The default decree of 1890 is not effective to defeat the claim of appellants here.....	93
CONCLUSION	99

LIST OF AUTHORITIES CITED.

(a) Cases.

Abbott v. New York, etc., R. Co., 145 Mass., 450.....	54
Adair v. Shaw, 1 Schoale & Lefroy, ch. 242.....	73
Allen v. Texas & Pacific Ry. Co., 25 Fed., 513.....	79
Bauserman v. Blunt, 147 U. S., 647.....	82
Bell v. Railroad Co., 34 La. Ann., 785.....	52, 55
Belleville Bank v. Winslow, 30 Fed., 488.....	82
Bihin v. Bihin, 17 Abb. Pr., 19.....	84
Bogert v. Southern Pac. Co., 244 Fed., 61.....	84, 92
Boursot v. Savage, L. R. 2 Eq., 134.....	74
California v. Pacific R. R. Co., 127 U. S., 1.....	39
Central Trust Co. v. Kneeland, 138 U. S., 414.....	48
Compton v. Jessup, 68 Fed., 263.....	48, 62
Daggers v. Van Dyck, 37 N. J. Eq., 130.....	92
Dey v. Dunham, 2 Johns., ch. 182.....	83
Donohue v. Vosper, 243 U. S., 59.....	32
Dunham v. C. P. & C. R. Co., 1 Wall., 254.....	48
Exploration Mercantile Co. v. Pacific, etc., Co., 177 Fed., 825..	70
Gallher v. Cadwell, 145 U. S., 368.....	90
Galveston, etc., R. Co. v. Cowdrey, 11 Wall., 459.....	48, 49, 56, 66

	Page
Gibbon v. Hoag, 95 Ill., 45.....	92
Gisborn v. Charter Oak Ins. Co., 142 U. S., 326.....	85
Gormley v. Bunyan, 138 U. S., 635.....	84
Halsted v. Grinnan, 152 U. S., 412.....	90
Hamilton v. Dooley, 15 Utah, 280.....	92
Hanchett v. Blair, 100 Fed., 817.....	82, 91
Harrington v. Atl. & Pac. Tel. Co., 143 Fed., 329.....	70
Henry v. Dick, 224 U. S., 1.....	32
Hopkins v. Walker, 244 U. S., 486.....	32
Houston & Texas R. Co. v. Texas, 170 U. S., 243.....	54
Indiana I. & L. R. Co. v. Swannell, 156 Ill., 616; 30 L. R. A., 290.....	74
Jackson v. Varick, 2 Wend., 291.....	83
Jones v. Vert, 121 Ind., 140.....	98
Kendall v. Klapperkhal Co., 202 Pa. St., 596.....	60
Kerrison v. Stewart, 93 U. S., 155.....	97
Leavenworth, etc., R. Co. v. United States, 92 U. S., 745.....	43
Life Ass'n, etc., v. Siddall, 3 De G., F. & J., 58.....	75
Lincoln v. Cambria Iron Co., 103 U. S., 412.....	57
London, etc., Bank v. Dexter, Horton & Co., 126 Fed., 593.....	91
McElroy v. Gadsden, 126 Ala., 184.....	98
Mansell v. Mansell, 2 P. Wms., 678.....	73
Mechanics Bank v. Seton, 1 Pet., 299.....	72
Muncie Pulp Co., <i>In re</i> , 159 Fed., 546.....	60
Myers v. Croft, 13 Wall., 291.....	44
Newman v. Newman, 152 Mo., 415.....	92
New Orleans v. Warner, 175 U. S., 130.....	85
New Orleans Pacific Ry. Co. v. Parker, 143 U. S., 42.....	6, 28, 30, 39, 43, 51, 60, 95
New Orleans Pac. Ry. Co. v. Union Trust Co., 41 Fed., 717.....	28, 51, 95
New Orleans Pacific Ry. Co. v. United States, 124 U. S., 124.....	17, 43
New York Trust Co. v. Bermuda Co., 211 Fed., 989.....	68
Noble v. Gallardo y Searry, 223 U. S., 65.....	91
Northern Pacific Ry. Co. v. Boyd, 228 U. S., 482.....	80, 80
Northern Pacific Ry. Co. v. Soderberg, 188 U. S., 526.....	32
Old Colony Trust Co. v. Dubuque, etc., Co., 89 Fed., 794.....	92
Oliver v. Platt, 3 How., 333.....	85
Oregon & California R. R. Co. Cases, 238 U. S., 393; 243 U. S., 549.....	44
Parker v. New Orleans, Baton Rouge R. R. Co., 33 Fed., 693.....	28, 95
Pennock v. Coe, 23 How., 117.....	48
Pere Marquette R. Co. v. Graham, 136 Mich., 444.....	48
Platt v. Union Pacific R. R. Co., 99 U. S., 48.....	5, 11, 44
Prince v. Heylin, 1 Atk., 493.....	83
Railway Co. v. McShane, 22 Wall., 444.....	43

INDEX.

V

	Page
Richardson v. Green, 61 Fed., 423.....	92
Rieger, Kapner & Altmann, <i>In re</i> , 157 Fed., 609.....	69
Robinson v. Kind, 23 Nev., 339.....	98
Rogers Locomotive Machine Works v. American Emigrant Co., 164 U. S., 559.....	77
St. Joseph & D. R. R. Co. v. Baldwin, 103 U. S., 426.....	7, 18
St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co., 139 U. S., 1.....	42
Sands v. St. John, 36 Barb., 633.....	84
Sanger v. Nightingale, 122 U. S., 176.....	82
Saunders v. Dehew, 2 Vernon, 270.....	73
Schulenberg v. Harriman, 21 Wall., 44.....	41
Schwartz v. Loftus, 216 Fed., 320.....	92
Sears v. Shafer, 6 N. Y., 268.....	84
Sinking Fund Cases, 99 U. S., 700.....	39
Southern Pacific Ry. Co. v. Orton, 32 Fed., 457.....	39
Southern Pacific Ry. Co. v. Poole, 32 Fed., 451.....	39
Southern Pacific Terminal Co. v. Interstate Commerce Commis- sion, 219 U. S., 498.....	67
Spokane Falls, etc., Ry. Co. v. Ziegler, 167 U. S., 65.....	32
Stevens v. Grand Central Mining Co., 131 Fed., 28.....	92
Sullivan v. Ellis, 219 Fed., 694.....	92
Sullivan v. Portland R. R. Co., 94 U. S., 811.....	84
Thompson v. White Water Valley R. Co., 132 U. S., 68.....	56
Townsend v. Vanderwerker, 160 U. S., 171.....	91
Union Pacific R. Co. v. McAlpine, 129 U. S., 305.....	72
United States v. Detroit Timber Co., 200 U. S., 321.....	51
United States v. Milwaukee Refrigerator Transit Co., 142 Fed., 247; 145 Fed., 1007.....	67, 68
United States v. Southern Pacific R. R. Co., 146 U. S., 570.....	39, 42
United States v. Southern Pacific R. R. Co., 45 Fed., 596.....	39
United States v. Stanford, 161 U. S., 412.....	39, 45
United States v. Union Stock Yard Co., 226 U. S., 286.....	67
Van Hook v. Whitlock, 2 Edw., ch. 304.....	83
Van Wyck v. Knevals, 106 U. S., 369.....	43
Wade v. Chicago, etc., R. Co., 149 U. S., 327.....	48, 62
Wheeling Bridge Co. v. Reymann Brewing Co., 90 Fed., 189....	92
Wilson v. Anthony, 19 Ark., 16.....	84
Wilson v. Plutus Mining Co., 174 Fed., 317.....	92
Wollaston v. Tribe, L. R. 9 Eq., 44.....	92
Wright-Blodgett Co. v. United States, 236 U. S., 397.....	55

(b) Statutes.

Act July 27, 1866, 14 Stat., 292.....	3
Act Mar. 3, 1871, 16 Stat., 573.....	2, 5, 6, 38, <i>et seq.</i>
Sec. 1	16, 78
4	8, 16, 78
6	8, 16, 78, 79
Secs. 8, 9, 12.....	7
Sec. 11	8, 10, 44, 45, 55, 58
19	2, 5
22	3, 7, 12, 43-5
23	3, 8, 45
Act May 2, 1872, 17 Stat., 59.....	8, 45, 78
Secs. 2 and 5.....	8
Act June 22, 1874, 18 Stat., 197.....	78
Act Feb. 8, 1887, 24 Stat., 391.....	4, 19, 24, 38, <i>et seq.</i>
Sec. 1	47
2	23, 47
3	23, 47, 66
Louisiana, Acts 1856, No. 194.....	53
Acts 1870, p. 7, No. 43.....	6, 54
Acts 1873, p. 29.....	11, 53, 54
Acts 1876, p. 30.....	79
Rev. Civ. Code, sec. 3308.....	51
Rev. Stats., 1870, sec. 692	53
sec. 693	55
New York, Code Civ. Proc., sec. 380.....	86
381.....	86, 87
382.....	86
388.....	86
390-a.....	82
413.....	83

(c) Miscellaneous.

12 Corpus Juris., 450.....	82
18 Enc. of Law, 2d ed., 101.....	92
Lewin on Trusts, p. 279.....	72
Mitford, Eq. Pl. & Pr., 4th ed., 273.....	83
3 Page on Contracts, sec. 1707.....	89
Pomeroy, Eq. Jurisprudence, secs. 688, 1048.....	72
Story, Conflict of Laws, sec. 280.....	82
8 Land Dec., 27.....	24, 76
Sen. Ex. Doc. 31, 48th Cong., 1st sess., p. 98.....	27, 76
Rep. Sec'y Interior, 1916, p. 114.....	4, 31, 89
Cong. Rec., vol. 15, pt. 6, p. 5640.....	12

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1917.

No. 92.

DAVID J. WALLER, JR., AND LEVI E. WALLER,
TRUSTEES, APPELLANTS,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

BRIEF FOR APPELLANTS.

Statement.

This is an appeal from a decree of the Circuit Court of Appeals for the Second Circuit affirming a decree of the District Court for the Southern District of New York dismissing appellants' bill of complaint.

The object of the suit is to compel appellee to pay thirty \$1,000 bonds issued in 1872 by the New Orleans, Baton Rouge and Vicksburg Railroad Company, and secured by mortgage and trust deed upon the right of way and alternate

sections of land granted to that company by the United States by act of Congress of March 3, 1871, incorporating appellee.

The alternate sections were granted expressly to aid in the construction of the railroad. Appellee succeeded to the rights of the Baton Rouge Company, and built the road upon the right of way with the aid of the alternate sections granted by the United States. About 1,275 bonds were issued under the trust instrument. This deed authorized the sale of the alternate sections, and the creation thereby of a sinking fund for the payment of the bonds. The fund was to be augmented after a certain time by one per cent of the gross receipts of the road. Not all of the lands had been received or disposed of at the time of the filing of this bill. Appellee bought or paid off more than nine-tenths of these bonds from the proceeds of the alternate sections, but failed to pay the thirty belonging to appellants' father and testator. The bonds matured in 1902. Appellants brought suit in Louisiana in 1908 on the bonds, which suit is still undisposed of. In 1913 they filed this suit in the southern district of New York to compel appellee to fully perform the trust and pay their bonds. The district court dismissed the bill on the ground that it was barred by the statute of limitations, though limitations had not been pleaded. The Circuit Court of Appeals affirmed the judgment, but placed it upon the ground of laches.

The land grant in question was contained in the act of March 3, 1871, incorporating appellee (16 Stat., 573). The purpose of that act was to procure the construction of a transcontinental military and post road from the Gulf of Mexico to the Pacific Ocean (sec. 19). The main link was to be built by appellee, and to extend from Marshall, Tex., to San Diego, Cal. Congress granted appellee a right of way 400 feet wide through the public lands, and all necessary lands for sidetracks, stations, etc., and to aid the construction of the road Congress granted twenty alternate odd-numbered non-mineral sections per mile on each side of the

road through the territories, and ten sections in the State of California (p. 576).

Connection was to be made with San Francisco by way of Los Angeles by the Southern Pacific Railroad Company, to which was granted as to this branch the same rights as were granted it by the act of July 27, 1866 (see. 23, p. 579).

The Baton Rouge Company, which had been incorporated by Louisiana in 1869, with power to construct a railroad from New Orleans to Baton Rouge and Shreveport, was adopted as the eastern link and was authorized to connect with appellee at its eastern terminus. It was given the same right of way through the public lands as was granted appellee. To aid its construction, section 22 of this act granted to the Baton Rouge Company the same number of alternate sections of public lands per mile as were granted to appellee in California (p. 579).

In 1872 the Baton Rouge Company executed a mortgage and deed of trust conveying all its property, including the lands granted by this act, to secure a \$12,000,000 bond issue. This instrument provided that the Baton Rouge Company should sell the alternate sections of land and devote the net proceeds thereof, together with 1 per cent of its gross income, to a sinking fund for the payment of the bonds.

This deed, in the usual way, pledged all the railroad and property and income of the company, its successors and assigns (R., 64).

Of these bonds only about 1,275 were ever issued. Appellee has bought or paid off 1,183 of them. Appellants own thirty of the remaining outstanding bonds and this suit is to compel their payment.

About 1881 the New Orleans Pacific Railway Company, which had obtained a charter from the State of Louisiana to construct a railroad between the same termini and over substantially the same route as the Baton Rouge Company, acquired control of the latter company. The purpose of this control was to secure the right of way and alternate sections

granted to it as above, without which the New Orleans Pacific Company found itself unable to construct its road. The land grant was secured, both by absorption of the stock of the Baton Rouge Company and by a direct conveyance, January 5, 1881, from it of its title to the land grant. A few months thereafter, in June, 1881, the New Orleans Pacific Company was merged and consolidated with and became part of appellee (R., 50). All the railroad property and right of way were taken in appellee's name. The alternate sections were to remain in the name of the New Orleans Company. The stockholders of the latter were to exchange their stock for stock in appellee, which became the owner of practically all its stock. The New Orleans Company thus became a part of appellee (R., 260). It seems to have been the purpose and effect of this merger to keep the name of the New Orleans Company in existence, but to actually use it as a department of the appellee for the purpose of handling the alternate sections.

The road, consisting of 250 miles, was entirely completed within a couple of years. However, continuous and determined efforts were made in Congress to forfeit the grant. These were finally put at rest by the act of February 8, 1887, which forfeited that part of the grant between New Orleans and Baton Rouge, and confirmed that part between Baton Rouge and Shreveport to the New Orleans Company as assignee of the Baton Rouge Company (24 Stat., 391).

The lands claimed were patented from time to time in the name of the New Orleans Company as assignee of the Baton Rouge Company. Not all had been patented at the time this bill was filed. Patents were still being issued in 1916 (Rep. Secretary of Interior for 1916, p. 114). Before any patents were actually delivered the New Orleans Company in 1883 and 1884 executed a mortgage to Messrs. Dillon and Alexander upon the alternate sections, which were also covered by the Baton Rouge mortgage. This covered all the lands granted except the right of way.

It was admitted by every one that the land grant was responsible for the construction of the road in question. Accordingly, the mortgage of the New Orleans Company of 1883 expressly recited that it was given in order to provide the means of payment for the land grant assigned to it, and for the construction of the railroad (R., 260). Messrs. Dillon and Alexander, the trustees of that mortgage, before 1890 purchased out of the proceeds of the sales of the land some 1,183 of the bonds of the Baton Rouge Company, of the 1872 issue, leaving only the bonds belonging to appellants and a few others outstanding. The road was constructed partly in the name of the New Orleans Company and partly in the name of appellee. It has since been owned and operated by appellee.

The object of Congress in the act of March 3, 1871, as declared in section 19 thereof, and as this court has said in speaking of other similar acts, was to secure the construction of a military and post road from ocean to ocean, and it granted not only the right of way to the road, but vast additional areas of public lands to aid in its construction (See *Platt vs. Union Pacific Co.*, 99 U. S., 48). Such aid could be obtained only by the pledge or sale of the lands. The New Orleans Company, without the aid of this grant, had been unable to secure the construction of the eastern link of the road. At the time it came into control of the grant it knew of the existence of the deed of trust executed by the Baton Rouge Company in 1872, and secured the benefits of the land grant with full knowledge of the lien of appellants' bonds and the trust existing for their payment.

Appellee in 1881 took the right of way in its own name, and has since owned and operated that portion of the trust property. The right of way and any railroad built upon it, whether by the Baton Rouge Company or its successors or assigns, and the income thereof, were covered by the trust (R., 64). Appellee has used the New Orleans Com-

pany merely as its creature to handle the alternate sections. Most of those sections have now been sold, though not in strict conformity to the trust provisions. The effort here is to compel the trustee to pay the bonds from the funds so realized.

Federal jurisdiction exists because the case is one arising under the laws of the United States. The construction of both the acts of March 3, 1871, and February 8, 1887, is involved. Appellants contend that the first act authorized the pledging of the granted lands to secure money to build the road, and that the second act recognized the title of the Baton Rouge Company and confirmed its conveyance to the New Orleans Company. Appellee denies both constructions, insisting that at the date of the trust deed in 1872 no title to the lands had passed which was capable of being pledged, and that the act of 1887 vested title to the lands in the New Orleans Company directly from the United States.

The Facts.

The Baton Rouge road was created by act of the Louisiana Legislature of December 31, 1869, with authority to construct a railroad from New Orleans to Baton Rouge, and from Baton Rouge west through Shreveport to the State line of Texas (Acts of 1870, p. 7, Act 43, Rec., 206).

It may be remarked parenthetically that in October, 1870, this company issued certain first mortgage construction bonds. It was held by this court that the mortgage to secure these bonds did not by its terms extend to the lands granted in 1871 by the United States (New Orleans Pacific Railway Co. *vs.* Parker, 143 U. S., 42).

The act of Congress of March 3, 1871 (16 Stat., 573), incorporated the appellee under the name of the Texas Pacific Railroad Company, with the authority to build a railroad from Marshall, Texas, to San Diego, California, following as near as might be the 32d parallel of north latitude.

Section 8 provides: "that the right of way through the public lands be, and the same is hereby, granted to the said company for the construction of the said railroad and telegraph line." The right of way is to be 400 feet wide over public lands. There is also granted all additional lands needed for sidetracks, stations, wharves, and buildings of all kinds. As held by the court in *St. Joseph, etc., R. Co. vs. Baldwin*, 103 U. S., 426, the title to the right of way attached as of the date of the grant, and could not be interfered with by settlers.

Section 9 grants to the company "ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached at the time the line of said road is definitely fixed."

Section 12 provides:

"Said company, within two years after the passage of this act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the territories and twenty miles within the State of California, to be withdrawn from preemption, private entry and sale."

Section 22 provides:

"That the New Orleans, Baton Rouge and Vicksburg Railroad Company chartered by the State of Louisiana, shall have the right to connect by the most eligible route to be selected by said company, with the said Texas Pacific Railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria in said State, to con-

nect with the said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California, to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor and opened for settlement and preemption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company within said State of California; provided that said company shall complete the whole of said road within five years from the passage of this act."

In section 23 authority is given the Southern Pacific Railroad Company of California to build a line to connect the Texas and Pacific with San Francisco, and a land grant in aid thereof is also given.

In section 11 of the act it was provided that appellee should have power to issue construction bonds and land bonds, the latter to be secured among other things upon the lands thereby granted; such mortgages were to be filed in the Department of the Interior, which filing was to be sufficient evidence of their legal execution.

By section 4 appellee was authorized to acquire other railroad corporations, and by section 6 was to become responsible for the debts or obligations of any company so acquired (16 Stats., 573).

The act of May 2, 1872, changed appellee's name to Texas and Pacific Railway Company. Section 2 authorized it to secure both the construction and the land bonds upon all or any part of the lands granted in aid of the construction of the road. Section 5 provided for its extension from Marshall to Shreveport, Louisiana (17 Stats., 59).

On November 11, 1871, the Baton Rouge Company filed in the General Land Office a map of the general route of

its road from Baton Rouge to Shreveport, and on February 13, 1873, filed a like map showing the general route of its road from New Orleans to Baton Rouge (Rec., 6, 82).

Upon the filing of these maps, and in accordance with section 12 of the act of 1871, all the odd-numbered sections of land upon both sides of the route within the limits of thirty miles were withdrawn from preemption, private entry and sale (Commissioner General Land Office to Register and Receiver at Natchitoches, November 9, 1871, R., 83). The map showing the route and the withdrawal limits appears on page 83 of the Record.

It may be noted here that we are not concerned with the land grant between Baton Rouge and New Orleans. The railroad did not earn the lands between those points, and they were forfeited to the United States by the act of 1887 hereafter mentioned, which act confirmed the grant between Baton Rouge and Shreveport.

In September, 1872, the Baton Rouge Company duly executed a mortgage and deed of trust to the Union Trust Company of New York to secure the payment of certain bonds.

This deed undertook to convey all the property, both present and future, of that company, its successors and assigns, including income. It specifically covered all interest of the Baton Rouge Company and its successors to the right of way and alternate sections granted by the act of March 3, 1871 (R., 62-64). After default in the payment of interest, action could be taken only at the option of the holders of a majority in interest of the bonds outstanding (article second), or upon the written request of the holders of at least 1,000 bonds then outstanding (article third, R., 66, 67). Pending default, the railroad was to retain possession of the road and lands (article first).

The railroad was to make a schedule of all lands not necessary for railroad purposes and to fix the value of each parcel, which schedule could be corrected yearly. With the written

consent of the Trust Company, the railroad was authorized to sell such parcels at the stipulated prices. The net proceeds were to be appropriated to a sinking fund for the redemption of the bonds (article fifth). On June 1, 1830, this sinking fund was to be augmented by one per cent of the gross earnings of the railroad, and yearly thereafter (article eighth). The railroad expressly covenanted to pay the bonds, and to do anything necessary to preserve the lien, hypothecation or incumbrance thereby created (article ninth).

This deed of trust was recorded in the Interior Department at Washington, as required by section 11 of the act of 1871 (R., 81). It was also recorded in New Orleans, the domicile of the railroad, and in the several parishes of Louisiana where the lands were situated and where the line of railroad was subsequently built (R., 80).

Thereupon the Baton Rouge Company issued bonds, and 1,275 of them, each of the denomination of \$1,000, were duly certified by the Union Trust Company (R., 57). Appellants' testator purchased thirty of these bonds, and at his death they came into the possession of appellants as his trustees and executors (R., 56).

The trial court found that plaintiffs' father "in due course for value and before their maturity became the owner and holder of the thirty bonds described in the bill, each of them being one of those issued under the mortgage referred to and each being for the sum of \$1,000" (R., 337). Interest was not paid upon these bonds after September, 1876, fifty-two coupons remaining (R., 5).

The provisions of the act of 1871 make it clear that any of the grants of land made in the Texas and Pacific charter may be conveyed, and conveyed separately from the franchises, right of way, and road. The only object of the land grant was to enable each company with the aid of the lands thus granted to raise means for constructing the road. This could be done practically only by pledging the lands so granted. This is forcibly presented in the brief of Messrs.

Dillon and Swayne, attorneys for the New Orleans Pacific Company (R., 148, 154), citing among other cases *Platt vs. Union Pacific Railroad Co.*, 99 U. S., 48, 56.

By an act passed by the Senate on February 21, 1872, and by the House on February 26, 1872, the Louisiana legislature expressly authorized the Baton Rouge Company to mortgage its land grant. There is a question as to the exact date of this act. The legislature adjourned February 29th, and the next session began December 9, 1872. The act was signed by the Governor December 11, 1872. It bears endorsement that it was presented to the Governor March 6th, but not having been returned by him to the House in which it originated on the first day of the meeting of the General Assembly after the expiration of the five days allowed by the constitution of the State, has become a law without his approval (*Acts of Louisiana*, 1873, p. 29, R., 206, 219-21). Whether this act became law before or after the date of the deed of trust is immaterial. It either authorized or ratified the deed of trust. Certainly it became law long before appellee acquired any interest in the land grant. But the act of March 3, 1871, would govern, and this both expressly and impliedly authorized the pledging of the lands. And since appellee's title to the land grant is founded upon an absolute deed from the Baton Rouge Company, it is estopped from asserting that that company was without power to convey a lesser title.

The deed of trust provided for the sale of all lands not needed for railroad purposes and the creation of a sinking fund from which the bonds were to be paid (R., 71-73). The bonds did not mature until September, 1902. In case of default in payment of the interest for a certain length of time the bonds then outstanding should, *at the option of the holders of a majority in interest*, forthwith become due and payable, and the trustee might also, *upon the written request of the holders of at least 1,000 bonds then outstanding*, foreclose the equity of redemption (R., 66, 67). Inasmuch as 1,183 out of 1,275 of the bonds were held by Dillon and

Alexander for appellee, appellants were in no position to act until their bonds matured.

What efforts were made by the Baton Rouge Company to construct its railroad do not appear. It did not build the road. Appellee acquired the title to the land grant and constructed the road. It is impossible to say whether, except for this interference, the Baton Rouge Company would ever have succeeded.

In 1876 the New Orleans Pacific Railway Company was formed, first by notarial charter, which was later ratified by act of legislature of Louisiana. This company was authorized to construct a railroad between the same termini as the Baton Rouge Company and over practically the same route as had been selected by that company.

Section 22 of the act of March 3, 1871, provided that the Baton Rouge Company should complete the whole of its road within five years. The New Orleans Company spent many years in endeavoring to secure from Congress an act forfeiting the grant to the Baton Rouge Company and conferring the same upon the New Orleans Company. It was particularly vigorous in its efforts between 1877 and 1880, but failed (Wheelock, president, New Orleans Company, to House of Representatives, 48th Congress (R., 178), Cong. Rec., vol. 15, pt. 6, p. 5640).

By 1880 the New Orleans Company found itself helpless and unable to complete its work, with only a portion of its roadbed constructed (R., 178).

Thereupon Mr. Wheelock, its president, sought to interest in it General Grenville M. Dodge and his associates, who were interested in the Texas and Pacific Railway.

After examination of the route, cost, etc., General Dodge told Wheelock that his people would not undertake the construction of the New Orleans road unless it could get the benefit of the land grant of the Baton Rouge Company; that since the routes of the two roads were practically identical it was clear, as a business matter, capital could not be en-

listed in the New Orleans Company as against another company having the advantage of the land grant.

Mr. Wheelock undertook to procure a transfer of the land grant from the Baton Rouge Company. General Dodge understood that these negotiations were carried on in the spring and summer of 1880. The General stated that unless this land grant could have been assured to the New Orleans Company he and his associates would not have enlisted in the enterprise of building the road (affidavit of Gen. Dodge, Feb. 18, 1884, R., 173-4).

The exact manner in which this transfer was accomplished is not altogether plain. It seems to have been both by merger and assignment.

In correspondence in 1911 between the chief clerk of the Interior Department and officers of appellee, the chief clerk mentions that the Baton Rouge Company has been purchased by or is controlled by appellee (R., 169). In reply Mr. Satterlee, appellee's secretary and treasurer, says:

"The New Orleans, Baton Rouge and Vicksburg Railroad Company was absorbed by the New Orleans Pacific Railway Company prior to the year 1882, the year which the Texas and Pacific Railway Company absorbed the New Orleans Pacific and made it part of its main line. *Said road has no independent existence whatever to my knowledge*" (R., 170-172).

December 29, 1880, the directors of the Baton Rouge Company, at a special meeting held in New York, authorized the president and secretary of the company to transfer to the New Orleans Pacific Railway Company, on such terms as they shall see fit, all the right, title and interest of the Baton Rouge Company in and to the land grant in question (R., 84).

The formal transfer was executed January 5, 1881, by the president and secretary of the Baton Rouge Company in New York (R., 48, 223).

February 3, 1881, the directors of the New Orleans Com-

pany resolved that the president of that company was authorized to accept the transfer from the Baton Rouge Company and to execute any documents necessary to evidence such acceptance (R., 85).

February 17, 1881, the Commissioner of the Land Office wrote the president of the Baton Rouge Company, reciting the foregoing steps and stating that when the president of the New Orleans Company accepts such transfer his company will be vested with all the right, title and interest of the Baton Rouge Company in said grant (R., 86).

February 19, 1881, the president of the New Orleans Company notified the president of the Baton Rouge Company by telegram that his company accepted the deed of transfer of January 5, 1881 (R., 88).

February 21, 1881, the Commissioner of the Land Office wrote the president of the Baton Rouge Company that the transfer of the land grant is now complete (R., 87).

June 20, 1881, the New Orleans Company was merged or consolidated with and became a part of the appellee (R., 50, 280).

October 17, 1881, George W. and Emma O. Cochran, stockholders of the Baton Rouge Company, protested to the Secretary of the Interior against the transfer of the land grant to the New Orleans Company. This protest was formally withdrawn November 23, 1881 (R., 89, 90).

October 20, 1881, and November 18, 1881, C. R. Bissell, a stockholder in the Baton Rouge Company, made a similar complaint to the Secretary of the Interior, on the ground that the transfer was made without being submitted to the stockholders of the Baton Rouge Company and without the knowledge of a large number of them (R., 91). November 19th he withdrew his protest, all matters having been satisfactorily adjusted with him as a stockholder (R., 92). Presumably only a pecuniary adjustment would be satisfactory.

Appellee evidently decided to forever settle all protests,

so far as stockholders were concerned. Accordingly, a meeting of the Baton Rouge stockholders was held December 9, 1881. All the stock then voted was held under proxy by Mr. Wheelock, president of the New Orleans Company. He was elected president of the meeting. The only business was the election of directors and the ratification and confirmation of the action of the directors in transferring the land grant to the New Orleans Company (R., 93-96).

There is nothing to show what consideration, if any, was paid for this assignment. The greater part of the stock came into the hands of the New Orleans Company, and we must presume through a "satisfactory adjustment." Thereafter the road ceased to have an independent existence (R., 172).

Thus the Baton Rouge Company was effectually prevented by the New Orleans Company from taking any steps thereafter toward the construction of its railroad, and from establishing the sinking fund, through the sale of the alternate sections or otherwise. But the New Orleans Company having taken the trust property became trustee in place of its grantor. The trust deed specifically binds the Baton Rouge Company and its successors as to the right of way and alternate sections, railroad and income (R., 62-64).

The merger agreement of June 20, 1881, between New Orleans Company and appellee, before referred to, is an unusual instrument. It is difficult to understand how, after a consolidation and merger, both corporations can exist as separate entities for any purpose. However, the attempt is made here to transfer to the appellee all the right of way, the railroad franchises and the property of the New Orleans Company, but to leave the latter in existence as a corporation with title to the alternate sections of land and with full power to mortgage and otherwise deal with such lands. The consolidation is to be effected by an exchange of stock, the stockholders to surrender their stock in the New Orleans Pacific Company and receive instead stock of appellee. The

stock so surrendered is not to be canceled, but is to be held by appellee, and the corporate existence of the New Orleans Pacific Company is to be maintained *until otherwise provided* (R., 50).

It is apparent that the attempt is made to preserve the existence of the New Orleans Company as a branch or department of appellee, which is to become the only stockholder and remain in full control of it and to have the option to terminate its corporate existence whenever deemed best. In other words, the New Orleans Company is to be maintained merely as a shell, and its actions are in fact those of appellee. Such is the construction given to the transaction by the parties. In the deed of April 17, 1883, to Dillon and Alexander, it is recited that the New Orleans Company has "merged or consolidated with *or become part of*" appellee (R., 280).

The parties are not agreed as to the authority for this merger.

By section 4 of the act of March 3, 1871, appellee is given authority to purchase the stock, land grants, etc., of and to consolidate with any railroad corporation on the route prescribed in the first section; in section 6 it is provided that the land grants, franchises and property of every description of such consolidated or purchased roads shall become absolutely the property of appellee, and that appellee shall assume the indebtedness and other legal obligations of such consolidated corporations, but not to an amount greater than the cash value of the assets received from the same (16 Stat., 575).

No other authority appears for this consolidation. Appellants contend that the merger could be made only under this statute, and that by its terms appellee became liable for the bonds. Appellee claims that it was first merged with some other State corporations, the charters of which authorized the present merger. However, there is nothing in the record on this point.

The New Orleans Company had acquired this land grant subject to the trust declared as to it. When appellee acquired the New Orleans Company it acquired the right of way and alternate sections, and while it might leave title, if it chose, in its department, the New Orleans Company, it succeeded to the trust which that department had assumed as to these lands, and became liable therefore to pay appellants' bonds.

The railroad was actually constructed by the appellee, partly in the name of the New Orleans Company and partly in its own name, and entirely upon the strength of the land grant. General Dodge, one of the appellee's incorporators, was also president of the American Railway Improvement Company. That company made a contract with the New Orleans Company in July, 1880, for the construction of its road (R., 126). This was before the merger with appellee, but after General Dodge and his associates had been convinced that the New Orleans Company could acquire the land grant.

The course, direction, and general route of the road contemplated to be built by the Baton Rouge Company, and the one actually built by appellee, are substantially the same, and the road actually constructed is within the limits of the lands withdrawn for the Baton Rouge Company, and near the middle of that grant (Dodge, R., 126-7; Dillon and Green brief, R., 101; Dillon & Swayne brief, R., 149; Payson, R., 130; Attorney General, 211).

In *New Orleans Pacific Co. vs. United States*, 124 U. S., 124, 126, this court said:

"After January 5, 1881, the petitioner (New Orleans Company) constructed 260 miles of the railroad from Shreveport, by way of Alexandria and West Baton Rouge to White Castle, in Louisiana, within the limits of the lands withdrawn for its grantor; and substantially upon the course, direction and general route of the road filed by such grantor."

To the same effect is the letter of Secretary Teller to President Arthur, of March 13, 1883 (R., 226).

Thus the appellee acquired some 260 miles of right of way 400 feet wide, and all necessary lands for sidetracks, stations, etc. This 260 miles was the distance between West Baton Rouge and Shreveport (R., 318).

Appellee did not admit that the right of way over the entire 260 miles was obtained from the Government. It called as a witness William H. Abrams, who had been in charge of its land and tax department since 1875; the title papers and deeds and maps of the New Orleans Company were turned over to him after the merger. Speaking only from hearsay thus obtained, he said that a large portion of the right of way of the New Orleans Company from Baton Rouge to Shreveport "is held under deeds from individuals," and that not more than 12 to 15 miles were built over public lands (R., 315-318).

Under the act of 1871, whenever the right of way was selected the railroad was entitled thereto as of the date of the original act (St. Joseph & D. R. R. Co. *vs.* Baldwin, 103 U. S., 426).

Under the land grant, the road was to have ten alternate sections per mile on each side of the road if the alternate sections were there in 1871. It is highly improbable that there was no public land over which the right of way could be laid out. The probability is that settlers had gone on the land after the act of 1871, and that the "deeds from individuals" referred to by the witness, were mere quitclaims of those whose title to the lands was inferior to that of appellee.

Certainly the 12 or 15 miles admitted by the witness to have been built on the public lands was impressed with the trust for the payment of appellants' bonds.

The land grant constituted a part of a consideration for building the road, and the railroad was actually constructed upon the faith of the alternate sections, the obtaining of

which was a *sine qua non* of the construction of the road (Dodge, R., 173-4; Payson, R., 129).

The road was completed early in November, 1882 (Wheelock, R., 161, 178). Thus a very substantial part of it was constructed in the name of appellee and upon the right of way granted by the deed of trust of 1872.

Application was then made for patents to the lands (Wheelock, R., 161).

Objections of all sorts were made. No patents were issued until March 3, 1885 (R., 230). Efforts to forfeit the alternate sections originally started by the New Orleans Company were continued as against it until set at rest by the confirmatory act of February 8, 1887 (24 Stat., 391). Affidavits and briefs in opposition to these long-continued efforts to forfeit the lands were filed by appellee with the Interior Department, the Attorney General, and various committees of Congress.

Everything was done in the name of its "part" (R., 280), the New Orleans Company. The interest of the appellee in the lands was apparently studiously concealed. The consolidation or merger agreement was filed in an out-of-the-way book in the office of the Secretary of State of Louisiana, June 28, 1881, known as the Book of Messages and Proclamations (R., 50, 230). It was not until 1909 that appellants learned of its existence (R., 56).

The steps taken in the efforts to keep the lands may be briefly stated.

Trouble had arisen with settlers who had gone upon the land. This was compromised by an agreement between Wheelock, president of the New Orleans Company, and two of the Louisiana delegation in Congress, dated January 4, 1882, by which the settlers and occupiers were to be permitted to buy the lands at \$2 per acre, not to exceed 160 acres each (R., 96). When this agreement was reached, Messrs. Robertson and Blanchard, the Louisiana Congressmen, notified the Secretary of the Interior that they did not wish to

throw any further obstacles in the way of the recognition of the rights claimed by the New Orleans Pacific Company (R., 98).

January 5, 1882, the Secretary of the Interior referred the matter to the Attorney General, asking the latter's advice upon a number of points, particularly as to the validity of the land grant and of its assignment to the New Orleans Company (R., 207).

Messrs. Dillon and Green and former Attorney General Pierrepont filed elaborate briefs with the Attorney General (R., 99). In view of appellee's attitude here, the position taken by its counsel in 1882 is important. Its lawyers then argued that the act of 1871 was a grant *in presenti* of the lands; that the title had passed to the Baton Rouge Company subject to a forfeiture for breach of the condition subsequent, but that until action was taken by the Government to avail itself of that breach, the title was good in the Baton Rouge Company; that the Baton Rouge Company clearly had the power to mortgage the land grant and therefore to sell it; and that the assignment of that title to the New Orleans Company was good.

The briefs were so effective that by an opinion of June 18, 1882, Attorney General Brewster adopted their views upon these points (R., 207).

He held that the act of March 3, 1871, passed to the Baton Rouge Company a *present interest* in a certain number of alternate sections of public lands per mile; that it was a present grant, but in the nature of a float, the sections to be afterwards located, and their location depending upon the establishment of the line of the road (R., 213). He said the purpose of the grant was to secure the construction of a railroad between the points designated. The interest derived by the grantee is a vested interest, held under the same limitations which apply after it develops into an estate in particular lands. He then held that the grant was assignable without the assent of Congress (R., 217, 218).

An effort was made in the Senate by some citizens of Louisiana to procure a forfeiture of the lands granted to the Baton Rouge road. On June 7, 1882, the committee on railroads reported against the forfeiture (R., 123).

October 17, 1882, General Dodge made an affidavit which was filed in the Interior Department, describing the building of the road. He said that the course, direction and general route of the road contemplated to be built by the Baton Rouge Company was substantially the same as that constructed by the New Orleans Company (R., 126).

Mr. L. E. Payson, a member of the judiciary committee, House of Representatives, had become interested in the matter. In October, 1881, he requested the Secretary of the Interior to suspend action upon the application for patents until he could be heard.

December 15, 1882, he wrote the Secretary of the Interior, reciting at length the history of the grant. He was convinced that the road had been constructed upon the faith of the alternate sections and that it would be unjust and unequitable not to patent them to the New Orleans Company as assignee of the Baton Rouge Company (R., 129-133).

May 22, 1883, the acting Commissioner of the Land Office wrote the president of the New Orleans Company that the land office would treat the dates of the filing of the maps showing the completion of the road—October 27, 1881, and November 17, 1882—as the date of the definite location of the road (R., 142). Sixty days was allowed the company within which to appeal to the secretary, if dissatisfied with this decision.

By letter of May 23, 1883, written in New York upon the heading of the Texas and Pacific Company, the president of the New Orleans Company accepted those dates as suggested by the Commissioner of the Land Office (R., 138).

In 1883, while further efforts were being made before Congress to forfeit the lands, appellee obtained the opinion of

its attorneys, Dillon and Swayne, to the effect that Congress was without power to forfeit those lands. This is the opinion, before mentioned, in which they argue very persuasively that under the decisions of this court the Baton Rouge Company had the right to mortgage the alternate sections, and, therefore, to sell them. They urge the inequity of a forfeiture in view of the fact that the road built accomplishes the purpose for which the grant was made, and is the only road in existence today connecting the Texas and Pacific system with New Orleans and the Mississippi. This opinion was filed in the Interior Department December 14, 1883 (R., 148-158).

February 18, 1884, General Dodge made another affidavit with regard to the construction of the New Orleans Pacific, and this was submitted to the Public Lands Committee of the House of Representatives (R., 172). About the same time the president of the New Orleans Company submitted to the House of Representatives a protest against the forfeiture of the lands (R., 177).

The two papers give a full history of the matter. They dwell at length upon the fact that the acquisition of the land grant was a *sine qua non* of the agreement to build the road, and that it was constructed upon the faith of the grant, and that the lands are necessary to enable them to pay for the road. They reiterate that the lines as originally laid down and as finally built are practically coincident, and they urge that a forfeiture of the lands would be monstrously unjust.

March 3, 1883, Secretary of the Interior Teller wrote President Arthur, stating that he had delayed action for months in the hope that Congress might legislate. He stated that the commissioner to examine the road reported that some 328 miles had been constructed in substantial compliance with law. He regarded the New Orleans Company as the lawful assignee of the Baton Rouge Company and entitled to patents for the alternate sections along 260 miles of

head, the New Orleans Company having withdrawn its claim as to the other 68 miles (R., 226).

President Arthur promptly approved Secretary Teller's recommendation that patents issue (R., 229, March 16, 1883).

For some reasons patents were not issued until March 3, 1885, on which date Patents No. 1, 2, 3, and 4 were issued to the New Orleans Pacific Company as assignee of the Baton Rouge Company (R., 230), for an aggregate of more than 570,000 acres (R., 186, 162).

On March 10, 1885, the Secretary of the Interior suspended further issue of patents (R., 163).

June 13, 1885, President Wheelock, of the New Orleans Company, wrote Secretary of the Interior Lamar, giving the history of the land grant, urging the issue of patents without further delay. He reiterated his assertion that the railroad was built with the aid of the lands (R., 161).

February 8, 1887, Congress finally passed an act settling the question as to the forfeiture of these lands (24 Stat., 391). As to that portion of the route between New Orleans and Baton Rouge, the lands were forfeited to the United States (section 1). As to these lands the New Orleans Co. had made no claim.

Section 2 provided that the title of the United States and of the original grantee to the other lands "is relinquished, granted, conveyed and confirmed to the New Orleans Pacific Railroad Company, as the assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company."

Section 3 provided that the relinquishment of the lands and the confirmation of the grant provided in the second section of the act are made and shall take effect whenever the Secretary of the Interior is notified that the New Orleans Pacific Company, "through action of a majority of its stockholders, has accepted the provisions of this act and is satisfied that said company has accepted and agreed to discharge all

the duties and obligations imposed upon" the Baton Rouge Company by the act of March 3, 1871.

April 14, 1887, at a stockholders' meeting of the New Orleans Company, called for that purpose, it was resolved that the company "accepts the provisions of the act of February 8, 1887, and also accepts and will discharge all the duties and obligations imposed upon the Baton Rouge Company by the act of March 3, 1871." It was also resolved that the president and secretary of the company and the board of directors were authorized to take whatever steps were necessary to complete and evidence such acceptance (R., 162).

It is to be noted that at this meeting 67,000 shares of the stock were represented out of the 67,200 outstanding. Of course appellee was the holder of the 67,000 shares. By this proceeding, and in direct obedience to the act of Congress, appellee itself accepted the provisions of that act.

On April 18, 1887, the attorney for New Orleans Company filed in the Interior Department copy of the appropriate resolutions, and requested that patents be issued to the company (R., 163).

April 22, 1887, the acting Secretary of the Interior directed the Commissioner of the Land Office to proceed with the issue of patents (R., 165).

Shortly after the passage of this act, one Babcock requested the Secretary of the Interior to withhold issue of further patents to the New Orleans Company until it had satisfied certain bonds of the Baton Rouge Company then held by him. By letter of April 23, 1887, the Acting Secretary declined to take such action (5 Land Dec., 593).

Thereafter, on February 8, 1888, the Commissioner of the Land Office submitted to the Secretary of the Interior certain lists of lands for patent to the New Orleans Company. Babcock renewed his protest. After referring to the decision just mentioned, Secretary Vilas said (8 Land Dec., 27):

"In passing upon this question the Department considered that the action of the stockholders above

referred to was sufficient to constitute an acceptance of the provisions of the act of Congress of February 8, 1887, and also an acceptance of an undertaking and obligation on its part to discharge all duties and obligations imposed upon the New Orleans Company, Baton Rouge and Vicksburg Company by said act of Congress of March 3, 1871, and to *protect all persons holding obligations or demands against said company*, but the nature and extent of such obligations could not be in any manner considered by the Department, but must be determined by the courts." (Italics ours.)

Pursuant to this decision, patents 5 and 6, for some 77,000 acres, were issued August 8, 1889 (R., 230). By the acceptance of these patents appellee accepted the condition upon which they were issued, namely: *that it should protect all persons holding obligations or demands of the Baton Rouge Company*. As will appear, appellee performed that condition as to nine-tenths of the bonds of the 1872 issue.

Subsequently further patents were issued, still upon the same condition, until by June 5, 1897, they aggregated some 981,000 acres (R., 186-7). By 1907 the lands patented aggregated some one million and one thousand acres. It is stated in the bill that the records of the Interior Department show more than 1,000,000 acres still due under the land grant (R., 10). The Dillon mortgage of 1883 estimated that the grant contained from 1,500,000 to 2,000,000 acres of land (R., 234). Patents to lands to the New Orleans Company were being issued as late as 1916. (See Annual Report Secretary of Interior, 1916, p. 114.)

Going back in point of time: On April 17, 1883, and before the delivery of any patents to it, the New Orleans Company executed a land-grant mortgage to John F. Dillon and Henry M. Alexander, by which, "in order to provide the means of payment for said land grant" assigned to it by the Baton Rouge Company, and for the construction of the railroad, and for other purposes, the New Orleans Company

conveyed to Dillon and Alexander, as trustees, all the alternate sections granted to the Baton Rouge Company by the act of March 3, 1871, and all the title thereto of said New Orleans Company. This mortgage was made to secure certain bonds to be issued. The bonds were not to be issued until the actual delivery to the company of the patents from the United States (p. 289), and were not to exceed \$2.50 per acre for the lands so patented (R., 257, 264, and other appropriate numbers).

After reciting that the New Orleans Company "has merged or consolidated with *or become part of the Texas and Pacific Railway Company.*" the mortgage provided that the appellee may, if the two companies shall at any time so agree, take the place of the New Orleans Company for the purpose of the mortgage (R., 280); that the land officers of either the New Orleans Company or the appellee will act for the trustees in making contracts for the sale of lands, and that in any suit brought by the trustees for instructions as to the performance of their duties, service of process upon either the New Orleans Company or the appellee shall be sufficient to give full jurisdiction (R., 281).

On January 5, 1884, a supplemental mortgage was executed. It recited the completion of the New Orleans road, the filing of the maps in the Interior Department, the inspection and approval of the road, the recommendation of the Secretary of the Interior to the President that patents should issue, and the President's direction to that effect. The mortgage then provided, because of the time which would elapse before the issue of the patents, that the bonds might be issued without awaiting the patents (R., 286).

It was agreed in the mortgage that the officers of the Land Department of the New Orleans Company, or by consent of that company, the trustees and the appellee, that the officers of appellee might act for the trustees in the sale of lands (R., 292); and that the trustees should have full power to convey lands without the joinder in the deeds of

either the New Orleans Company or the appellee (R., 295).

After the execution of these mortgages, the New Orleans Company issued certain certificates, known as land-grant scrip certificates, in which the company promised to deliver the bonds to be executed under the Dillon and Alexander mortgages. These certificates were issued to the amount of \$4,250,000 (R., 193, 194).

Subsequently, land-grant bonds to the extent of forty per cent of these certificates, or \$1,700,000, were issued under said mortgages (R., 194).

Dillon and Alexander, as trustees, sold to numerous persons hundreds of thousands of acres of the alternate sections, and received, in addition to large sums of cash, \$1,576,000 of said bonds (R., 196, 197).

They also purchased before 1890, and unquestionably from the proceeds of the scrip certificates or bonds just mentioned, 1,183 of the Baton Rouge bonds of 1872 (R., 298). At that time they thought only about 1,200 of such bonds had been issued (R., 245). The actual figure is 1,275 (R., 57).

That the Dillon and Alexander mortgage was not understood to be in denial of the trust deed of 1872 appears from a letter (not in the record) dated May 5, 1883, from Senator C. H. Van Wyck to the Secretary of the Interior, objecting to the issue of patents under the Baton Rouge grant. In this, after describing the mortgage to Dillon and Alexander, he says: "Two trustees are named, one in the interest of the present company, and one in the interest of the bonds issued twelve years ago." See Senate Ex. Doc. 31, 48th Cong., 1st Session, p. 98).

Thereafter certain litigation arose over the bonds issued by the Baton Rouge Company in 1870, before the grant of lands by the United States in 1871. One Parker, holding some of these bonds, brought suit in the Circuit Court of the United States for the Western District of Louisiana to foreclose the mortgage securing the bonds. A cross-bill was filed to have

that mortgage decreed not a lien upon the land grant. A decree of foreclosure was entered in 1888 (*Parker vs. New Orleans, Baton Rouge Railroad Co.*, 33 Fed., 693). An appeal to this court was decided in 1892. This court reversed the decision below, holding that the mortgage was not intended to apply to the land grant (143 U. S., 42).

Pending this appeal a suit was filed in the eastern district of Louisiana in the name of the New Orleans Company and the Baton Rouge Company against the Union Trust Company and Messrs. Dillon and Alexander to remove the cloud upon their title arising from this mortgage of 1870 (R., 303). The Union Trust Company, being the trustee under that mortgage, had defaulted in the Parker suit, and yet the court had sustained the mortgage. In the new suit in the western district the Union Trust Company appeared through counsel, but the court held that the mortgage of 1870 did not extend to the land grant. The opinion was rendered March 21, 1890. No appeal was taken. Curiously enough, while the same attorneys appeared for the New Orleans Company in both cases, no mention is made in this opinion of the decision in the Parker case (*New Orleans Pacific Railway Co. vs. Union Trust Co.*, 41 Fed., 717). Jurisdiction of this suit could only be taken as one arising under the laws of the United States. While the plaintiffs were both Louisiana corporations and the defendants all citizens of New York, yet if the parties were properly aligned according to their interest, the New Orleans Co. and Dillon and Alexander would be plaintiffs and the Union Trust Co. and the Baton Rouge Co. defendants. This would put citizens of each State on both sides of the controversy.

On March 3, 1890, Messrs. Dillon and Alexander filed in the Circuit Court for the Eastern District of Louisiana a bill against the New Orleans Pacific Company and the Union Trust Company to declare that both the mortgage of 1870 and the mortgage of 1872, executed by the Baton Rouge Company, were not a lien upon the land grant, or if they

were a lien that they were subordinate to the mortgages to Dillon and Alexander (R., 231). There were joined as defendants the Baton Rouge Company and one Carter who held two of the bonds of 1872. Carter had previously filed a suit on the overdue coupons, but dismissed it when pressed to trial. The ostensible object of Dillon and Alexander's bill was to enjoin suits which Carter threatened to bring every six months on his coupons. Carter and his attorney Leonard were made defendants. It was alleged that Leonard represented other holders of bonds of the 1872 issue. Carter and Leonard appeared and filed pleadings contesting the bill. The dormant Baton Rouge Company revived long enough to appear, but did not answer. The New Orleans Company and the Union Trust Company did not appear (R., 301). Thereupon, and apparently in order to obtain a decree by default, plaintiffs by an *ex parte* order dismissed their bill as to all the defendants who were opposing them, including Carter, the holder of the two bonds under the 1872 mortgage (R., 302). After thus eliminating the dangerous defendants, they forthwith took a final decree by default against the corporations. This decree holds that neither of the mortgages of the Baton Rouge Company is a lien upon the alternate sections. It does not relate to the right of way, for that was not involved in the suit (R., 303, 307).

This case clearly arose under the laws of the United States. It proceeded on the theory that no title was actually granted to or required by the Baton Rouge Company under the act of 1871, but that the title to the lands was granted directly to the New Orleans Company by the act of 1887 (R., 246, 249, 250). It could not be grounded on diverse citizenship, because the plaintiffs and the Union Trust Company were all citizens of New York.

The bill of complaint in the present case attacks this decree as having been obtained in bad faith and as part of the plan

of appellee to remove the land grant from the operation of the trust instrument of 1872 (R., 13-17).

The answer of appellee affirmatively pleads this litigation and default decree as *res judicata* binding upon appellants here (R., 39). It is admitted that appellants were not parties to that suit, but because the Union Trust Company, trustee under the deed of trust, was a party, it is said they are bound by its default. This presents a remarkable situation. There were made parties to that suit both the trustee and the only known holders of bonds; the plaintiffs stated that the total issue of bonds was about 1,200, of which they themselves held 1,183 (R., 245), while the individual defendants held the remainder so far as complainants knew. It is not surprising that under such circumstances the trustee should let the case go by default, especially when one of the bondholders had appeared and was contesting the action. But when the suit is voluntarily dismissed as to the bondholder, it cannot be that a decree so obtained by default is binding on that very bondholder as well as on others who were never parties to the suit.

It is to be remembered, also, that Mr. Dillon, one of the plaintiffs to that suit, was then appearing in this court as counsel in similar litigation for two of the defendants, the New Orleans Company and the Baton Rouge Company, against which he took the default decree (*New Orleans Pacific Co. vs. Parker*, 143 U. S., 42).

The answer to appellee's contention is plain. The decree plainly was not obtained in good faith; the parties are not the same; it does not apply to the right of way. Finally, the effort here is not to reach the lands themselves, but their proceeds. The New Orleans Company procured or permitted this decree to be entered. It is responsible for whatever injury was thereby inflicted on appellants.

Messrs. Dillon and Alexander were succeeded as trustees by John T. Granger and George S. Clay. Finally, receivership proceedings were filed by them against the New Orleans

Pacific Company. From this it appeared that large quantities of lands had been sold, but that all the debts under the trust had not been paid. April 18, 1899, a receiver was appointed (R., 183-204). As already stated, patents were still being issued as late as 1916.

Appellants' bonds did not mature until 1902. Long before that time Messrs. Dillon and Alexander had acquired the majority of the issue. Under the terms of the deed appellants were prevented from taking action on the coupons.

They filed their first suit in Louisiana some six years after the maturity of the bonds. In the answer to the suit they learned for the first time of the merger of appellee and the New Orleans Company. That merger agreement had been recorded, not in Washington, but in a book called Messages and Proclamations at Baton Rouge (R., 230). They also at the same time learned for the first time of the suit filed by Messrs. Dillon and Alexander in New Orleans in 1890 and of the default decree therein (R., 56).

As a result of their investigations, prompted by the discoveries in the Louisiana litigation, they filed the suit in New York in 1913.

Appellee had succeeded to an express trust and become trustee thereof. The trust was not yet entirely executed. Lands were still being received. (See Report Secretary Interior for 1916, page 114, showing patents in that year.) Appellee was still enjoying the railroad which it acquired as its share of the trust property. No change had occurred in its position. It had not been injured or prejudiced in the slightest degree. Limitations could not be pleaded as a bar to their action, because the trust was express. Indeed it would be difficult to imagine a case where the application of the doctrine of laches would be more inequitable.

This suit was filed in 1913 in the District Court of the United States for the Southern District of New York as a case arising under the laws of the United States. It is clear from the foregoing statement of facts that the construction

of the land-grant act of 1871, and the confirmatory act of 1887, has long been in dispute. It has been contended on the one hand that the act of 1871 gave the Baton Rouge Company a title which was the subject of conveyance by mortgage or otherwise, and the deed of 1872 established a valid trust therein, and that the title of the Baton Rouge Company was recognized by the act of 1887, which confirmed the lands in its assignee the New Orleans Company. On the other hand, it was claimed, as by Messrs. Dillon and Alexander in their suit in 1890, that the Baton Rouge Company had received no title under the act of 1871 (R., 246), and that the act of 1887 had first forfeited the claim of the Baton Rouge Company to the lands and then vested title thereto directly from the United States to the New Orleans Company (R., 249, 250).

It appears from the bill of complaint that the case depends upon the proper construction of these two acts of Congress. The case will be sustained under the construction contended for by appellants, and defeated under the contrary construction. It is therefore one arising under the laws of the United States.

Hopkins vs. Walker, 244 U. S., 486, 489.

Northern Pacific Ry. Co. vs. Soderberg, 188 U. S., 526, 527, 528.

Spokane Falls, etc., Ry. Co. vs. Ziegler, 167 U. S., 65, 72.

Henry vs. Dick, 224 U. S., 1, 16.

Jurisdiction also lies because of the controversy over the validity and effect of the default decree of 1891, which raises a Federal question.

Donohue vs. Vosper, 243 U. S., 59.

The defendants were the Texas and Pacific Railway Company, the New Orleans Pacific Railroad Company, and the Union Trust Company. The Trust Company was dismissed

by order of November 20, 1913 (R., 54). The New Orleans Company was not served, it having practically ceased to exist, and being but a part of appellee.

Appellee filed a lengthy answer admitting some and denying other averments of the bill. It also filed several affirmative defenses. As was to be expected it repeated the contentions theretofore asserted by its associates. It denied the power of the Baton Rouge Company to convey the lands by way of mortgage and deed of trust of 1872, and asserted that the New Orleans Company had acquired title directly by the act of 1887 (R., 30-39). The default decree obtained by Messrs. Dillon and Alexander in the suit filed in 1890, in the Eastern District of Louisiana, was pleaded in estoppel (R., 39). It averred that it was a mere stockholder in the New Orleans Company and not responsible for the latter's acts (R., 44). Finally, it pleaded laches (R., 47).

The case was tried in open court upon oral and documentary evidence. The district court found for appellee on the statute of limitations which was not pleaded (R., 336). This was affirmed by the Court of Appeals, but the judgment was placed on the ground of laches (R., 347). 229 Fed., 87.

The purpose of Congress was to cause the construction of a transcontinental military and post road. Congress granted vast areas of public lands to aid that end. The purpose has been accomplished. The road could not have been built without the aid of the right of way and alternate sections granted by Congress to the Baton Rouge Company. Under the act of March 3, 1871, granting the lands, the Baton Rouge Company had the right to mortgage them and to make them trust property to secure payment of its bonds. The Baton Rouge Company did declare those lands, as well as all its property, railroad, and income, to be trust property for such purpose, and issued bonds secured thereby. Appellee had full knowledge of the trust declared and of the existence of the bonds. It came into control and took possession

of the lands with this knowledge. It built the road upon the right of way so obtained and with moneys derived from the proceeds of the alternate sections. These alternate sections it sold to numerous persons and received the proceeds, from which it paid off nine-tenths of the bonds.

By these actions appellee took the place of the Baton Rouge Company and became the express trustee for the payment of the bonds. It received and sold the trust property, obtaining the benefit thereof. The trust is not yet exhausted. Appellee should therefore finally perform the trust and pay the few remaining bonds secured upon this trust property.

ASSIGNMENT OF ERRORS.

The decrees of the courts below were erroneous in dismissing the bill of complaint, whether on the ground of the statute of limitations, as in the District Court, or of laches, as in the Court of Appeals.

The other questions involved in the case were not passed on. The courts below erred in not deciding those questions in favor of appellants. The assignments of errors appear in detail, beginning at pages 321 and 349 of the record. Without repeating the formal assignments here, the errors are covered in the following points, the specifications relied on being stated in the form of affirmative propositions.

ANALYSIS OF ARGUMENT.

I.

The deed of trust of 1872 was a valid conveyance of the rights granted by the act of March 3, 1871, and the trusts thereby established in favor of the bondholders attached to the specific land constituting the right of way and alternate sections as they were afterwards identified by the definite location and construction of the railroad. The title, as perfected by this identification, and subsequent issuance of patents, and as confirmed by the act of February 8, 1887, related back to the date of the original act, and enured to the benefit of the bondholders as of the date of the deed of trust.

(1.) THE VALIDITY AND EFFECT OF THE DEED OF TRUST ARE DETERMINED BY THE ACTS OF CONGRESS, PROPERLY CONSTRUED.

(2.) THE SUBJECT-MATTER GRANTED BY THE ACT OF MARCH 3, 1871, WAS SUSCEPTIBLE OF CONVEYANCE WHEN THE DEED OF TRUST WAS MADE, ITS NATURE IN THAT REGARD BEING DETERMINED BY THE ACT OF CONGRESS AND NOT BY THE ORDINARY RULES OF CONVEYANCE.

REPEATED DECISIONS OF THIS COURT ESTABLISH THAT SUCH AN ACT OF CONGRESS VESTS IN THE GRANTEE A PROPERTY INTEREST—A TITLE—IN THE RIGHT OF WAY AND ALD SECTIONS, WHICH BECOMES A TITLE TO SPECIFIC LAND WHEN THE ROAD IS LOCATED, AND THAT THIS PERFECTED SPECIFIC TITLE RELATES BACK TO THE DATE OF THE ACT.

(3.) THE DEED OF TRUST WAS THEREFORE NOT A CONVEYANCE OF PROPERTY TO BE ACQUIRED, BUT OF PROPERTY ACTUALLY EXISTING.

(4.) THE ACT AUTHORIZED THE COMPANY TO USE THE GRANTED LANDS AS A BASIS OF CREDIT, AS WAS ACTUALLY DONE.

(5.) EVEN IF THE DEED OF TRUST COULD BE REGARDED AS A MORTGAGE OF PROPERTY TO BE ACQUIRED, IT WOULD STILL BE SUPPORTED BY THE ACTS OF CONGRESS AND THE DECISIONS OF THE FEDERAL COURTS UPHOLDING MORTGAGES OF THAT CHARACTER BY RAILROAD COMPANIES.

(6.) THE CASE AFFORDS A CLEAR OCCASION FOR APPLYING THE EQUITABLE DOCTRINE OF RELATION, IN CONSTRUING THE ACTS OF CONGRESS, FOR THE PROTECTION OF THE EQUITIES OF THE BONDHOLDERS.

II.

The deed of trust was valid under the Louisiana law.

III.

Appellee, which claims title under and through the Baton Rouge Company, is estopped to deny its power to convey the land by way of mortgage and deed of trust.

IV.

The pleadings and evidence show the execution of the trust instrument of 1872 and the issue and non-payment of appellants' bonds.

V.

The title of the New Orleans Pacific Company, acquired from the Baton Rouge Company in January, 1881, was subject to the trust created for the payment of appellants' bonds.

VI.

Appellee and New Orleans Pacific were legally one corporation, so far as this case is concerned. The acts done in the name of the New Orleans Pacific were in law the acts of appellee, and the appellee is responsible therefor.

VII.

The right of way and alternate sections were charged with a trust in favor of the bondholders. Appellee, with full knowledge of such trust, obtained possession of the lands. Appellee thereby took the place of and became the express trustee. Having disposed of the trust property, in substantial accord with the trust, and paid off most of the bonds, it will be compelled in equity to completely perform and pay the remainder of the bonds.

VIII.

By the merger of the New Orleans Company with appellee the latter became liable to pay the bonds.

(1.) THIS IS TRUE UNDER THE ACT OF 1871 CHARTERING APPELLEE.

(2.) LIABILITY ATTACHES UNDER THE PRINCIPLE OF NORTHERN PACIFIC RY. CO. VS. BOYD.

IX.

The statute of limitations is no bar to this action.

(1.) THE STATUTE OF LIMITATIONS WAS NOT RELIED UPON IN THE ANSWER, AND, THEREFORE, CANNOT BE AVAILED OF.

(a) *Federal courts will require limitations to be pleaded, if such is the local law.*

(b) *Under the New York law limitations must be expressly pleaded.*

(c) *The rule adopted in New York is so general that this court has applied it without reference to State decisions.*

(2.) THE STATUTE OF LIMITATIONS IS NOT APPLICABLE TO AN EXPRESS TRUST.

(3.) THE PERIOD OF LIMITATIONS, IF ANY IS APPLICABLE, IS TWENTY YEARS.

X.

Appellants were not guilty of laches.

XI.

The default decree of 1890 is not effective to defeat the claim of appellants here.

ARGUMENT.

I.

The deed of trust of 1872 was a valid conveyance of the rights granted by the act of March 3, 1871, and the trusts thereby established in favor of the bondholders attached to the specific land constituting the right of way and alternate sections as they were afterwards identified by the definite location and construction of the railroad. The title, as perfected by this identification, and subsequent issuance of patents, and as confirmed by the act of February 8, 1887, related back to the date of the original act, and enured to the benefit of the bondholders as of the date of the deed of trust.

(1) THE VALIDITY AND EFFECT OF THE DEED OF TRUST ARE DETERMINED BY THE ACTS OF CONGRESS, PROPERLY CONSTRUED.

That the instrument was valid, if tested by the State law, will be shown separately. See *infra*, II.

Even if there was any law of Louisiana limiting the right of the Baton Rouge Company to mortgage property or convey it in trust to secure debts, it was not a law affecting its powers as a corporation, but a general law of conveyancing affecting individuals and corporations alike. Such a law, purely local in its operation, could be of no consequence in a case like this. Whether lands which Congress has granted to foster a great national enterprise, and in which the United States retains a contingent interest for the security of the plan, may be mortgaged by the grantee to raise funds to carry on the work is no concern of the States where the lands chance to lie, but a matter for Congress alone to determine. Indeed, it has been distinctly held by this and the lower

Federal courts that, when in creating an interstate railroad Congress selects a State corporation to perform part of the task, the corporation becomes for the purpose a Federal agency and may receive from Congress Federal powers and franchises which are not conferred or contemplated by its charter. *California vs. Pacific R. R. Co.*, 127 U. S., 1, 44; *United States vs. Southern Pacific R. Co.*, 45 Fed., 596, 601 (reversed on another ground, 146 U. S., 570). See also *Southern Pacific Ry. Co. vs. Poole*, 32 Fed., 451; *Southern Pacific Ry. Co. vs. Orton*, 32 Fed., 457, 472; *Sinking Fund Cases*, 99 U. S., 700, 727.

In *United States vs. Stanford*, 161 U. S., 412, 433, the court said:

"The relations between the California corporation and the State were of no concern to the National Government at the time the purpose was formed to establish a great highway across the continent for governmental and public use. Congress chose this existing artificial being as an instrumentality to accomplish national ends, and the relations between the United States and that corporation ought to be determined by the enactments which established those relations."

There is no doubt whatever of the intention of the Baton Rouge Company to bind all its interest in both right of way and granted sections, and bind the title to the specific lands when identified, whether in the hands of itself or its successor. The deed of trust in question is as express and specific on this subject as it could well be made. In this respect it is wholly unlike the earlier instrument of 1870, which this court had under consideration in *New Orleans Pacific Ry. Co. vs. Parker*, 143 U. S., 42. In that case the granting act had not been passed when the mortgage was made, and in view of that fact and the restricted language employed in the mortgage, this court construed the mortgage as not intended to apply to the aid sections, if granted. In this case,

the deed of trust was made after the grant, and definitely and literally conveys the sections as well as the railroad, etc. We come, therefore, to the meaning of the acts of Congress.

(2) THE SUBJECT-MATTER GRANTED BY THE ACT OF MARCH 3, 1871, WAS SUSCEPTIBLE OF CONVEYANCE WHEN THE DEED OF TRUST WAS MADE, ITS NATURE IN THAT REGARD BEING DETERMINED BY THE ACT OF CONGRESS AND NOT BY THE ORDINARY RULES OF CONVEYANCE.

REPEATED DECISIONS OF THIS COURT ESTABLISH THAT SUCH AN ACT OF CONGRESS VESTS IN THE GRANTEE A PROPERTY INTEREST—A TITLE—IN THE RIGHT OF WAY AND AID SECTIONS, WHICH BECOMES A TITLE TO SPECIFIC LAND WHEN THE ROAD IS LOCATED, AND THAT THIS PERFECTED SPECIFIC TITLE RELATES BACK TO THE DATE OF THE ACT.

This was a grant *in presenti*. The right of way and the aid sections "are hereby granted." The nature and effect of such grants have been considered time after time by this and the lower Federal courts. The grantee, at the date of the act, obtains a property interest, which this court has repeatedly declared to be a *title*. It is a grant of public lands which are not identified by the act itself but will become so by the action of the grantee in following the procedure which the act defines. It is a "float" grant, similar to the Spanish and Mexican grants of so many acres, to be located by the grantee anywhere within a larger area of defined outboundaries. The act defines the termini. The grantee locates its line between them, and immediately, without more, this title, which was floating, fastens on a particular right of way and particular tracts—the odd sections, within so many miles, on either side, to which other rights have not previously attached under the public land laws. As the act is a law as well as a conveyance, it operates according to its intention without regard to those rules of conveyancing

which require individuals to identify specific lands in their deeds.

In *Schulenberg vs. Harriman*, 21 Wall., 44, 60, this court said:

"That the act of Congress of June 3d, 1856, passed a present interest in the lands designated there can be no doubt. The language used imports a present grant and admits of no other meaning. The language of the first section is, '*that there be, and is hereby, granted to the State of Wisconsin*' the lands specified. * * * It is true that the route of the railroad, for the construction of which the grant was made, was yet to be designated, and until such designation the title did not attach to any specific tracts of land. The title passed to the sections, to be afterwards located; when the route was fixed their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land."

(P. 62:)

"Numerous other decisions might be cited to the same purport. They establish the conclusion that unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. No individual can call in question the validity of the proceedings by which precision is thus given to the title where the United States are satisfied with them.

"The rules applicable to private transactions, which regard grants of future application—of lands to be afterwards designated—as mere contracts to convey, and not as actual conveyances, are founded upon the common law, which requires the possibility of present identification of property to the validity of its transfer. A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the legislature requires."

In *St. Paul & Pacific R. R. Co. vs. Northern Pacific R. R. Co.*, 139 U. S., 1, 5, the court said:

"The language of the statute is, 'that there be, and hereby is, granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future. The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in presenti*; that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route. This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion. [Citing many cases.] The terms of present grant are in some cases qualified by other portions of the granting act, as in the case of *Rice vs. Railroad Co.*, 1 Black, 358; but unless qualified they are to receive the interpretation mentioned."

And in *United States vs. Southern Pacific R. R. Co.*, 146 U. S., 570, 594, in construing this very grant of March 3, 1871, as applied to the Southern Pacific in California, this court, after quoting the extract from 139 U. S. above set forth, observed that—

"In view of this late and clear declaration, it would be a waste of time to attempt a reëxamination of the questions, or a restatement of the reasons which have established these as the settled rules of law in respect to land grants, and made it so that the old common-law rule as to the necessity of identification to a conveyance has not been controlling in determining the scope and effect of a Congressional land grant."

See also *Leavenworth, &c., R. Co. vs. United States*, 92 U. S., 745; *Van Wyck vs. Knerals*, 106 U. S., 350.

It is, of course, true, as pointed out in *New Orleans Pacific Ry. Co. vs. Parker*, 143 U. S., 42, 57, that title to particular lands does not pass until they have been identified by the railroad location. It is equally true, however, that the equitable fee in the particular lands becomes fully vested coincidently with their identification, subject only to the right of the Government to be reimbursed for the cost of surveying the odd sections before issuing its patents (see *Railway Co. vs. McShane*, 22 Wall., 444; *New Orleans Pacific Ry. Co. vs. United States*, 124 U. S., 124), and to the condition subsequent which allows Congress, at its option, to forfeit the grant if the railroad has not been constructed within the time prescribed and before Congress takes action. But all these qualifications of the company's title are manifestly without importance in this case.

(3) THE DEED OF TRUST WAS THEREFORE NOT A CONVEYANCE OF PROPERTY TO BE ACQUIRED, BUT OF PROPERTY ACTUALLY EXISTING.

There can be no question, in view of the authorities cited, that at the date of the deed of trust the company was the owner, not of a promise or contract merely, but of a very valuable property interest in public lands, which had been conveyed to it, and, as the act specified, to "its successors and assigns" (sec. 22). If Congress could convey this property interest to the company, the company, if Congress did not forbid, could convey it in turn to another. And just as the identifying of the lands and the perfecting of the title could take place without further action on the part of Congress, so could they take place without further acts of conveyance by the company.

(4) THE ACT AUTHORIZED THE COMPANY TO USE THE GRANTED LANDS AS A BASIS OF CREDIT, AS WAS ACTUALLY DONE.

In support of this proposition there exist a number of cogent reasons; and there is no reason, that we can see, opposed to it.

In the first place, the right of alienation is an inherent of property which is always held to be present unless its absence is clearly made out (*Myers vs. Croft*, 13 Wall., 291). By this act (sec. 22) Congress not only did not forbid alienation, but, in using the word "assigns," expressly gave it, in respect of the aid lands, and as these were undoubtedly granted in order to enable the grantee to raise money for the construction of the road, the power to pledge them at some stage is beyond question. *Platt vs. Union Pacific R. R. Co.*, 99 U. S., 48, is so clear upon this point that other citations would be superfluous. See also the *Oregon & California R. R. Company Cases* in 238 U. S., 393, and 243 U. S., 549.

Section 11 of the granting act provides that the Texas Pacific Company shall have authority to issue two kinds of bonds secured by mortgage; the first, upon its railroad, and all appurtenances belonging to it when constructed or in the course of construction; the second, "on all or any portion of the lands hereby granted in aid of the construction of said railroad as is provided for in this act," and "on lands acquired by any arrangement or purchase or terms of consolidation with any railroad company or companies to whom grants of land may have been made or may hereafter be made by any congressional, State or territorial authority," etc., with the provisos that such mortgages shall be filed and recorded in the Department of the Interior, and "shall confer all rights and property of said company as therein expressed"; that the proceeds of the sales of the bonds shall be applied "only in construction, operation and equipment" of the contemplated railroad line; and that such mortgage "shall in no wise im-

pair or affect any lien existing on the property of said company or companies at or before the time of such consolidation."

By section 22 Congress selected a State corporation which already by its State charter was given power to mortgage its railroad property, to complete the part of the road in Louisiana, and, by section 23, another State corporation to complete it in California, and aided both by grants of rights of way and aid sections, referring to the grants made by the same act to the Texas Pacific. There can be no doubt that a unified project was in mind, and there ought to be no hesitation in construing the statute as intended to bring about a uniformity of results. (See *United States vs. Stanford*, 161 U. S., 412, 431.)

Section 11 should be read with sections 22 and 23. The former as amended by the supplemental act of May 2, 1872 (17 Stat., 59) gives expressly the right to mortgage the right of way before actual construction and to mortgage "all or any portion of the lands hereby granted in aid of the construction." In respect of the latter, Congress used the same form of words in describing the subject-matter of the mortgage as it did in describing the subject-matter granted by the act. It seems plain enough, then, that the Texas Pacific might mortgage its right in the aid lands immediately and before any of them were identified either by location or construction of the road, and in view of the purpose of the whole act it would be most unreasonable not to infer a like intent respecting the lands granted to the Baton Rouge and Southern Pacific Companies by the concluding sections.

In this connection we should not omit to point out that section 11 significantly provides that the Texas Pacific may mortgage any land grants which it may acquire by purchase or consolidation with other companies, while taking care to provide that such mortgages shall not impair any lien existing on the property of such other companies at the time of consolidation.

Obviously, we think, the only possible doubt would be based on the circumstance that when our deed of trust was made the precise lands of the grant had not been defined. But any such doubt, if it exists, should be at once dispelled by the following considerations: The act, as we have shown, quite evidently contemplates that the Texas Pacific may mortgage its aid lands as granted. The thing granted, as we have also shown, is property—a title, and, technically considered, is no less subject to be assigned or otherwise conveyed to secure debts than to be assigned out and out. The right of assignment before definite location is expressly given in section 22 of the act; the assignment actually made was recognized as valid by the Secretary of the Interior, the Attorney General, and by Congress, and confirmed and approved by the act of February 8, 1887. It was the very basis of all the rights obtained by the New Orleans Company and the appellee. Without it, the executive branch of the Government would not have issued the patents as it did before the act of 1887, and without it Congress would not have passed that act. It was by relying upon the assignment and insisting upon its validity that appellee's counsel, in the name of the New Orleans Company, secured the confirmation and the patents. Their counsel, as this record abundantly shows, took the ground that the assignment was valid, and to clinch this proposition they argued most convincingly (see brief of Dillon and Swayne, R., 153) that as a matter of course the title of the Baton Rouge Company was one which could be mortgaged, as had been done in other like cases; and this construction of the statute was accepted by the Government in both its executive and legislative branches.

While there is an attempt upon the part of the present counsel of the appellee to set up the act of 1887 as a wiping out of what had previously been done, and the making of a new grant to the New Orleans Company, of course neither the history nor the words of the act will lend the slightest color to such construction. The first purpose of

Congress was to forfeit the grant in part, as was done by the first section. The second section then provides that "the title of the United States and of the original grantee to the lands granted by" the act of 1871 "to the said grantee"—the Baton Rouge Company—and not so forfeited, "is relinquished, granted, conveyed and confirmed" to the New Orleans Company "as the assignee" of the Baton Rouge Company. The third section speaks of the "relinquishment of the lands and the confirmation of the grant provided for in the second section," and declares that it shall not take effect until the Secretary of the Interior is notified that the New Orleans Company, through its stockholders, has accepted the act and is satisfied that that company "has accepted and agreed to discharge all the duties and obligations imposed upon" the Baton Rouge Company by the act of 1871. Furthermore, the last section of the act *confirms* the patents which have been previously issued by the Secretary of the Interior, on the assumption that the New Orleans Company was the legitimate successor, by assignment, of the Baton Rouge Company.

It being thus demonstrated that consistently with the purpose of Congress the whole title from its inception was transferable from one railroad to another, the right to make a qualified transfer to obtain funds to carry out that purpose would seem to rest beyond dispute. Congress gave the land in order that money might be raised *when needed*. The sooner the resources of the company were mobilized the better for the rapid advancement of the enterprise. Clearly, then, Congress must have meant to allow the grantee to mortgage its grant whenever it could. As we point out elsewhere, the government's rights could not be effected adversely. See *infra*, p. 50.

(5) EVEN IF THE DEED OF TRUST COULD BE REGARDED AS A MORTGAGE OF PROPERTY TO BE ACQUIRED, IT WOULD STILL BE SUPPORTED BY THE ACTS OF CONGRESS AND THE DECISIONS OF THE FEDERAL COURTS UPHOLDING MORTGAGES OF THAT CHARACTER BY RAILROAD COMPANIES.

This court has sustained the right of a railroad under State statutes to mortgage all of its property, whether in possession at the time of the mortgage or subsequently acquired.

Pennock vs. Coc, 23 How., 117.

Dunham vs. C. P. & C. R. Co., 1 Wall., 254.

Galveston, etc., R. Co. vs. Cowdrey, 11 Wall., 459.

Central Trust Co. vs. Kneeland, 138 U. S., 414, 419.

Wade vs. Chicago, etc., R. Co., 149 U. S., 327, 341.

Compton vs. Jessup, 68 Fed., 263, 286-8.

Pere Marquette R. Co. vs. Graham, 136 Mich., 444, 449.

In *Dunham vs. R. R. Co.*, *supra*, this court, speaking of *Pennock vs. Coc*, said (237) :

"Terms of the grant in that case were, 'all present and future to be acquired property,' and yet this court held, in a controversy between the grantees of a first mortgage and the grantees of a second mortgage, that the first took the future acquired property, although the property itself was not in existence at the time the first mortgage was executed. While enforcing the rule there laid down, this court said there are many cases in this country confirming the doctrine, and which have led to the practice extensively of giving that sort of security, especially in railroad and other similar great and important enterprises of the day. Several cases were cited by the court on that occasion, which fully support the position, and many more might be added, but it is unnecessary to refer to them, as the one cited is decisive of the point."

2 Story, Eq. Jur. (8th ed.), sec. 1040-1040-a.

In *Galveston, etc., R. Co. vs. Cowdrey, supra*, this court said (480) :

"As to the first point, without attempting to review the many authorities on the subject, it is sufficient to state that, in our judgment, the first, second and third deeds of trust, or mortgages, given by the Galveston Railroad Company to the trustees, estops the company and all persons claiming under it and in privity with it, from asserting that those deeds do not cover all the property and rights which they profess to cover. Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad, which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it necessary for a railroad company to borrow money in small parcels as sections of the road were completed, and trust deeds could safely be given thereon. The practice of the country and its necessities are in coincidence with the rule."

We have seen that the Texas Pacific was expressly, and the Baton Rouge and Southern Pacific Companies inferentially, permitted to mortgage the aid lands, as granted, by the act of 1871.

In the present case the general location was made and the lands were withdrawn from entry by the Department before the deed of trust was issued. The grant had thus gained practical fixity, which needed only a definite location, or actual construction of the road, to evolve into a complete equitable fee. It is conceded that the line of the road as constructed was substantially the same as the general location. So that whatever quality of futurity attached to the

subject-matter had become much attenuated by the date of the deed. The grantee had made a location which, by its successors, was deemed good enough to build the road upon; the lands were withdrawn, so that no private claims could intervene under the general land laws, and the company had but to adopt its definite location and file its map to gain title to the specific right of way and adjacent sections.

How fanciful, then, is the objection against the right to borrow money on the land as things then stood! The Government could not possibly be injured, for in any event the condition subsequent enabled it to regain clear title if the road were not actually built within the time limited, and none of its lands could be touched by the lien until they became specifically identified, when the right to mortgage would be unquestionable. It was indeed to the interest of the Government that the company obtain all necessary funds as soon as it could. None of the customary objections to future mortgages was present, for by no possibility could either the Government or third parties be misled or injured in the slightest degree.

(6) THE CASE AFFORDS A CLEAR OCCASION FOR APPLYING THE EQUITABLE DOCTRINE OF RELATION, IN CONSTRUING THE ACTS OF CONGRESS, FOR THE PROTECTION OF THE EQUITIES OF THE BONDHOLDERS.

A purchaser of railroad bonds is under no obligation to see to the application of the purchase-money, and so we are at a loss to understand the importance of the fact, if it be a fact, that the money borrowed by the Baton Rouge Company was not used for the advancement of the road. Surely the Baton Rouge Company, had it built the road and secured the patents, would have been in no position to dispute the bonds upon the ground that it had misapplied the money. Its privies are in like manner estopped. The original equities of the bondholders, thus immune from challenge, ad-

hered to the title in every stage of its evolution and attached to the specific land when identified and patented no less than if the land had been thus fully acquired by the original grantee itself. The full title, as we have proven, related back to the date of the grant.

It has long been the settled doctrine of this court that when the acquisition of full title results from a series of acts the final step which perfects it will be related back to the initial one for the purpose of protecting an equity against intervening claims.

U. S. vs. Detroit Timber Co., 200 U. S., 321, 334.

II.

The deed of trust was valid under the Louisiana law.

Appellees cite section 3308, Revised Civil Code of Louisiana, which provides:

"Future property can never be the subject of conventional mortgage."

Reliance is also had on *N. O. P. Ry. Co. vs. Union Trust Co.*, 41 Fed., 717, and *N. O. P. Ry. Co. vs. Parker*, 143 U. S., 42.

In these cases it was decided that a mortgage given by the Baton Rouge Company in 1870 did not include, and was not intended to include, the land grant of March 3, 1871. There was much discussion in Judge Pardee's decision, and a very slight discussion in the decision of this court (p. 54) of the power of the Baton Rouge Company to mortgage the land grant, but that discussion was wholly unnecessary to the decision which was reached.

That the Baton Rouge Company in 1872, under the Louisiana law, had ample power to pledge its right of way and alternate sections, even if they could be considered after-acquired property, seems to have been settled by the Supreme

Court of Louisiana in *Bell vs. Railroad Company*, 34 La. Ann., 785. There the objection is made that a mortgage of a railroad company did not apply to after-acquired property. The right of railroad companies generally to mortgage their after-acquired real estate was discussed at length and upheld. The court said it was notorious that in the United States railroads for the most part have been constructed with money borrowed upon bonds secured by mortgage, which bonds are intended for circulation in different cities of the United States and abroad. Many of such roads extend throughout different States, and it is important that there should exist a uniformity among the different States on the subject of such mortgages.

The court then discussed the charter of the road in question, by which it was authorized to secure its loans by mortgage on property of the company, in whole or in part, as it shall deem expedient.

The court continued:

"In 1854, 1855, and 1856 the general assembly passed acts regulating the power of railroad corporations, conferring that of securing the payment of any obligation contracted by them for the construction of the road and for repairs upon it, by mortgage, whether the road had been completed or not at the time of making the mortgage, and that such mortgage would bind the property, the franchises and appurtenances of said railroad, its warehouses, depots, water stations, locomotives and the like, registry being required at the place of domicile only."

The court then held that these acts were an innovation of the Louisiana system relative to conventional mortgages, and were intended to give the railroads of Louisiana the same powers of like organizations in other States, and were necessitated by the urgent wants of such corporations.

After discussing a number of cases arising in other States,

including decisions of this court, in which it was held that a railroad company did have the power to mortgage all property which it might acquire in the future, the Louisiana court concluded that such power was conferred upon the road in question and upon all similar companies then or thereafter in existence in Louisiana.

The act of 1856 referred to by the court is No. 194 of that year, subsequently incorporated into the Revised Statutes of 1870 as section 692. It provides that railroad companies may borrow whatever money is required for the construction or repairs of their road, and may issue bonds or other obligations secured by mortgage upon the franchises "*and all the property of said companies.*"

The charter of the Baton Rouge Company of 1869 and the Louisiana act of 1872 authorized this deed of trust.

Section 6 of the charter of 1869 contains a grant of a right of way through the public lands of Louisiana; section 14 authorized the company to borrow money and to purchase property for the purpose of constructing and maintaining its road, to issue bonds and notes as evidence of indebtedness. To secure the payment of said bonds and notes it "may mortgage its railroads, its capital stock, its corporate franchises, *any of its real or personal property*, or any portion of the same."

Section 15 authorized the issue of second-mortgage bonds. Section 16 authorized such bonds to be secured by mortgage upon its property, the payment of the bonds to be guaranteed by the State. The first mortgage was declared to be a lien "upon every mile of railroad within the State of Louisiana, including the right of way, roadbed, rails, depots, stations, shops, buildings, machinery, tools, engines, cars, and real and personal estate within the State of Louisiana, appurtenant to or necessary for the operation of said main line of railroad owned by the company at the date of such mortgage, or which may be acquired by it thereafter, and of the corporate franchises and privileges of said company granted

by the State of Louisiana relative to the construction, operation, and use of said main line of railroad within the State of Louisiana."

The act of 1872 recited that by the act of Congress of March 3, 1871, the Baton Rouge Company has become the recognized branch of the Texas Pacific Railroad Company from its eastern terminus through the States of Texas and Louisiana to the city of New Orleans; that it has become the grantee of every alternate section of land in a belt forty miles each side of said line of railroad, and said act of Congress has been executed by the action of the United States, by the withdrawal of all public lands within the aforesaid boundary from sale or entry under any law. It then authorized the Baton Rouge Company to commence the construction of their road at New Orleans or Shreveport or any intermediate point, authorized the issue of first-mortgage bonds to not exceeding \$30,000 per mile, and the mortgage thus to be given shall carry with it a first lien upon the real and personal property and effects of said company *and all lands acquired by the act of Congress or otherwise* (Louisiana Acts of 1873, p. 29).

True, it is claimed that this act did not become effective until December, 1872. It was passed by the legislature in February, 1872. Clearly it was intended to authorize the issue of the bonds of 1872. Even if it did not become effective until December, it was at least a ratification by the State of the mortgage given by the Baton Rouge Company in September, 1872.

Houston and Texas R. Co. vs. Texas, 170 U. S., 243, 259.

Abbott vs. N. Y., etc., R. Co., 145 Mass., 450, 454.

New Orleans was the domicile of the Baton Rouge Company (Charter, section 4, Louisiana Acts of 1870, p. 7). The deed of 1872 was recorded in New Orleans (R., 57) and in every parish through which the road ran (R., 80).

The law of Louisiana provided that record of a mortgage

of a railroad company in the parish of its domicile shall be sufficient. Unlike an ordinary mortgage, it need not be re-inscribed at the end of ten years (sec. 693, Rev. Stat., 1870).

Bell vs. R. R. Co., 34 La. Ann., 795, *supra*.

III.

Appellee, which claims title under and through the Baton Rouge Company, is estopped to deny its power to convey the land by way of mortgage and deed of trust.

There is no question here of an innocent holder for value without notice.

This deed was of record in the domicile of the Baton Rouge Company, and in every parish through which the line ran. Record in the domicile was sufficient (Louisiana Rev. Stat., 1870, sec. 693).

It was also recorded in the Department of Interior at Washington, and under the act of 1871 (appellee's charter), granting the lands, this is all that was required (sec. 11, 16 Stat., 577).

The appellee nowhere alleges that it did not have actual notice of the trust. It cannot now assert such a defense.

Wright-Blodgett Co. vs. U. S., 236 U. S., 397, 403-4.

On the contrary, it appears from the bill of Messrs. Dillon and Alexander, filed in 1890, that appellee must have had complete knowledge of this deed. Those gentlemen aver that the New Orleans Company was a purchaser for value, without knowledge of the mortgage of 1870, and "also free from and clear of any lien arising from the mortgage of 1872" (R., 238). They do not aver that the New Orleans Company was without notice of the trust of 1872.

With both record and actual notice of this instrument appellee in 1881, after long negotiation, succeeded in acquiring control of the Baton Rouge Company, and took from it a

conveyance of the grant of public lands by the act of 1871.

We discuss hereafter the proposition that the New Orleans Company and appellee are one and the same. Here it should be remembered that appellee took title in its own name to the right of way, while it left the title to the alternate sections in the New Orleans Company.

Every claim of appellee to this land has subsequently been based on the title of the Baton Rouge Company. Its title to the alternate sections was finally confirmed to the New Orleans Company *as assignee* of the Baton Rouge Company by the act of 1887.

In defending appellee's title, prior to the confirmatory act, its representatives insisted upon the right of the Baton Rouge Company to sell, and to support that argument urged that it had the right to mortgage, and cited the fact that many railroads had mortgaged the land grants (R., 117, 154).

The Baton Rouge Company was estopped to deny the validity of its deed of trust of 1872 as applicable to the grant of lands from the United States. Any subsequent grantee from it is likewise estopped. Therefore, appellee here cannot deny that the alternate sections as well as the right of way and railroad are impressed with the trust declared in the deed of 1872.

Galveston, etc., Co. vs. Cowdrey, 11 Wall., 459.

Thomson vs. White Water Valley R. Co., 132 U. S., 68.

IV.

The pleadings and evidence show the execution of the trust instrument of 1872 and the issue and non-payment of appellants' bonds.

No question was made by appellee in the pleadings or at the trial as to the valid execution of the deed of trust and the issue of the bonds. However, in the brief in the Court

of Appeals, counsel "urged that the record did not contain the necessary proof that the Baton Rouge Company bonds were ever lawfully issued so as to become the binding obligation of the Baton Rouge Company" (Brief, p. 2).

This suggestion is equivalent to a plea of *non est factum* at law. Such defense must be pleaded. This record contains no such defense. This rule is particularly applicable to negotiable bonds. Said this court in *Lincoln vs. Cambria Iron Co.*, 103 U. S., 412, speaking of a bond issued by a county:

"A bond, especially a negotiable bond, is a *prima facie* obligation of the obligor, if he has capacity to make it, and is binding according to the terms and conditions apparent on its face until the contrary be shown."

The bill of complaint alleged the due execution on the 4th of September, 1872, of the mortgage and deed of trust to the Union Trust Company, and that the latter duly appeared and accepted of record its trusteeship under the mortgage. That the deed secured 12,000 bonds of \$1,000 each, payable September 1, 1902, of which only 1,250 were issued and certified by the trustee. That appellants are the lawful owners and holders, before maturity, and for a good and valuable consideration, of 30 of said bonds, which were recognized as valid and subsisting obligations by appellee. The number of the bonds are given, and one is filed. Fifty-two coupons are attached to each. That said deed was duly recorded in New Orleans Parish, Louisiana, and in the office of the Secretary of the Interior at Washington (R., 4-6).

Appellee, in its answer, admitted that on September 4, 1872, an instrument was executed purporting to be a mortgage or deed of trust of the Baton Rouge Company to the Union Trust Company covering its railroad and personal property. Appellee denied sufficient knowledge to form a belief whether the copy filed with the bill was correct or

whether it had been properly recorded. As to the allegation of what the instrument authorized and the issue of 1,250 bonds, appellee had not sufficient information to form a belief. It denied that it had ever recognized the bonds as valid and existing obligations of itself (R., 21, 22).

In its first affirmative defense, after describing the execution of the deed of trust, it continued "to secure an intended issue of mortgage bonds, certain of which bonds thereafter were issued, and a part of which bonds so issued, if now outstanding, are those claimed to be owned by plaintiffs herein" (R., 23).

These allegations admit both the execution of the deed and the issue of the bonds. Clearly they do not deny either of those things. At the trial no point of this kind was made.

The evidence shows the execution of the deed and the issue of the bonds.

Under section 11 of the act of 1871, any mortgages are to be filed and recorded in the Department of the Interior, "which shall be a sufficient evidence of their legal execution" (16 Stat., 577). This instrument was so recorded (R., 81).

It was also recorded in New Orleans Parish, the domicile of the Baton Rouge Company (R., 57, 79) and in every parish through which its route ran (R., 80).

The certified copy of the deed offered in evidence shows that it was executed by the president of the corporation by the direction of its board of directors, and in accordance with its charter (R., 57-58).

Peter Palmer, the transfer clerk of the Union Trust Company, produced the bond book of that company, trustee, and it was agreed by counsel that this book, of date September 4, 1872, shows that there was issued and signed by the trustee 1,275 bonds of the denomination of \$1,000 each, numbered from 1 to 1200, inclusive, and from 1501 to 1575, inclusive.

Palmer also identified the signature on the bonds of I. H. Frothingham, president of the trust company at the time of the issue of the bonds.

"According to the Bond Book of the Union Trust Company, these bonds were issued by these numbers. It is agreed by counsel that the bonds described in the bill by numbers are produced, except as to one filed in New Orleans and one mislaid." It was also agreed that the Bond Book shows that there were issued and certified by the trustee 1,275 bonds for \$1,000 each (R., 56-57).

Fifty-two of the coupons remained attached to appellants' bonds, indicating that interest had been paid for four years (R., 5).

Levi E. Waller, one of appellants, testified that he and his brother were executors and trustees under the will of his father, who died in 1893; that the bonds sued on came into appellants' possession among the papers of their father's estate, and appellants are still the owners and holders thereof; that he thought his father owned these bonds seven or eight years before his death.

The trial court found that appellants' "intestate, in due course for value and before their maturity, became the owner and holder of the thirty bonds described in the bill, each of them being one of those issued under the mortgage referred to, and each for the sum of \$1,000" (R., 337).

From the pleadings in the case of *Dillon vs. New Orleans Company*, filed in the eastern district of Louisiana, and upon which appellee relies in support of its defense of *res judicata*, it is plain that Messrs. Dillon and Alexander and everybody connected with the case up to that time admitted the execution of the mortgage and the issue of the bonds thereunder. The bill of complaint again and again refers to that instrument as the mortgage of 1872 (R., 238, 255).

Complainants in that suit allege the execution of the mortgage of September 4, 1872, by one Calvin H. Allen, representing himself to be the president of the company and assuming to act under its authority; that they are informed and believe that about 1,200 of the bonds secured by the said mortgage "have been issued and are now outstanding, of

which your orators are the holders and lawful owners of 1,183 of the said bonds." They allege that one Carter claims to hold two of said bonds; that the mortgage was recorded in the Parish of Orleans on September 4, 1872; that they do not know who hold the remainder of the bonds which have been issued under said mortgage, though Carter's attorney, Leonard, also a defendant, has some of them under his control as agent for parties unknown (R., 244-6).

Appellee relies upon a statement made by Mr. Justice Brown in the case of *New Orleans Pac. Ry. Co. vs. Parker*, 143 U. S., 42, 44:

"On September 4, 1872, one Allen, assuming to act as president of the Baton Rouge Company, also executed a mortgage to secure the payment of 12,000 bonds, which, however, appear never to have been issued."

This statement is incompetent here. That suit involved the question whether the mortgage of 1870 attached to the lands granted by the act of 1871. There was no occasion in that suit to give any evidence relating to the deed of trust of 1872, and nothing to be decided about it.

From the bill in that case it appears that Parker sought to subordinate the 1872 bonds to his own. He also alleged that none of the bonds provided for by the 1872 deed had been issued. The New Orleans Company was not concerned in defending those bonds. It admitted the execution of the 1872 deed, but was not advised how many of the bonds were outstanding. No evidence was taken on the subject. (See the Record in that case, pp. 9, 36; Transcripts of Records this court, 1891, vol. 9, p. 7760, 7775.)

V.

The title of the New Orleans Pacific Company, acquired from the Baton Rouge Company in January, 1881, was subject to the trust created for the payment of appellants' bonds.

This seems elementary. If the deed of trust was valid and covered the lands in question, its lien could not be escaped merely by transfer of the grantor's interest to another corporation.

Nor is appellee's position strengthened by the assertion that its title came through the act of February 8, 1887. In that statute Congress was scrupulous not to change the status of the parties. The New Orleans Company had independent authority from Louisiana to construct its road, but it had no grant of lands; it had failed in its project until it acquired the grant of the Baton Rouge Company, when (backed by appellee) it easily built the road. Its claim to the lands was based solely on its succession to the rights of the Baton Rouge Company. It had no standing otherwise. This was recognized both by the New Orleans Company and by Congress. So the statute in terms confirmed the title in the New Orleans Company *as assignee of the Baton Rouge Company*. By this Congress did not mean to cut out any rights which had attached, but to leave the land subject thereto.

And the trust instrument in this case expressly provided that it should apply to the lands whether final title was acquired by it or its successors or assigns.

After conveying the railroad constructed and to be constructed, and all real and personal property held, or afterwards acquired, all franchises, rights and privileges then held or afterwards acquired by the Baton Rouge Company, its successors or assigns, the deed continues:

"And also, all the right, title, interest, claim, estate or demand whatsoever which the said railroad company or its successors now has, or may at any time hereafter acquire, or become in any way entitled to, of, in, and to all the lands, and sections of lands situate, lying and being on either side of the said railroad, as the same may be finally located and constructed, in accordance with and as granted by the act of Congress, entitled 'An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,' approved March 3d, 1871; and also, all the right of way granted by the State of Louisiana, or by the United States, together with all and singular the tenements, etc." (R., 63-4).

It is not material, therefore, whether the complete title to the right of way and alternate sections was ultimately vested in the Baton Rouge Company or in its successors and assigns, the New Orleans Pacific Company and the appellæ.

Wade vs. Chicago, etc., R. Co., 149 U. S., 327, 341.

Compton vs. Jessup, 68 Fed., 263, 386-8.

Again, it is not important from this point of view whether the Baton Rouge Company had complete title to the lands or whether the deed of 1872 was technically a lien. Unquestionably the Baton Rouge Company had some kind of vested interest in and title to those lands; it unequivocally declared a trust as to whatever interest it had. The New Orleans Company acquired that interest, with knowledge of that trust. All its title was founded upon the interest so acquired, and the trust still attached to the lands, even though the title had yet to be perfected.

VI.

Appellee and New Orleans Pacific were legally one corporation, so far as this case is concerned. The acts done in the name of the New Orleans Pacific were in law the acts of appellee, and the appellee is responsible therefor.

The purpose of the act of 1871 was to cause the construction of this transcontinental military and post road. The main link had been built, but connection was needed with the Gulf of Mexico and the Mississippi River. Appellee found it could not rely upon either the Baton Rouge Company or the New Orleans Company. It therefore acquired control of the latter and merged with it. By this action, it acquired the partially constructed road and completed the same. This was done only by the aid of the alternate sections of land. Appellee, for its own reasons, saw fit to keep the title to those sections in the New Orleans Company. Has appellee so handled the situation that a court of equity is unable to hold it responsible for the actions which it took through and in the name of the New Orleans Company?

Appellee admits that the railroad so acquired and paid for is and for many years has been a part of its main line. It admits that it is the principal stockholder of the New Orleans Company, and can handle that company as it pleases. It asserts, however, that in the eyes of the law two separate and independent legal entities exist, and that appellee cannot be held responsible for any act which it may cause the New Orleans Company to do.

While we recognize the general rule as to corporations, we assert that under the circumstances of this case appellee broke down the separate entity of the New Orleans Company and made the latter its mere creature or department, and that it is responsible in equity for its acts performed through and in the name of the New Orleans Company.

It is to be remembered that as to the right of way appellee cannot make this technical defense. It took the right of way in its own name and subject to the trust which had been declared by the Baton Rouge Company. As to that, it cannot hide behind the legal fiction of separate corporate entities. The present discussion is directed to showing that as to the alternate sections it is equally responsible.

By agreement of June 20, 1881 (R., 50), the New Orleans Company consolidated itself with appellee under the latter's name, thereby vesting in the latter all of its franchises, rights, privileges and property. The agreement undertook to provide that the lands acquired directly or indirectly by the New Orleans Company from the United States or the State of Louisiana or the Baton Rouge Company, other than the lands necessary for railway purposes, should be exempted from the contract and not pass thereby (R., 51).

The consideration for the merger was that the New Orleans Company stock should be exchanged share for share for the stock of appellee; that appellee should hold such stock in the New Orleans Company for the purpose of transferring to appellee the enjoyment of all rights pertaining to such ownership, and that until otherwise provided, the corporate existence of the New Orleans Company should be maintained, with power to carry out all existing contracts and to mortgage the land grant.

In other words, appellee undertook to merge with itself all the franchises of the New Orleans Company, including that to be a railroad corporation. This was the purpose for which the New Orleans Company was created. When it transferred its franchise to be a railroad, it could not legally remain as another and altogether different corporation for the purpose of dealing with lands—an object altogether foreign to its charter. It might with the same legality have undertaken to engage in the business of manufacturing and merchandising.

The plain meaning of this merger was that appellee in-

tended to and did take control of the entire situation. It put all of the franchises and railroad property directly in its own name. It undertook to keep the New Orleans Company in existence as a mere department to handle the alternate sections of land.

This is apparent from the land mortgages given by the New Orleans Company in 1883 and 1884. It is impossible to read these instruments and escape the conviction that the two companies were interchangeable and that they were dealt with as one and the same corporation.

The instrument recites "that whereas the New Orleans Pacific Railway Company has merged or consolidated with *or become part of the Texas and Pacific Railway Company.*" It then provides that if the two companies at any time shall so agree, the appellee may take the place of the New Orleans Company for the purpose of the mortgage (R., 280); that the land officers of either company will act for the trustees in making contracts for the sale of lands; and that in any suit brought by the trustees for instructions as to the performance of their duties, service of process upon either the New Orleans Company or appellee shall be sufficient to give full jurisdiction (R., 281).

So, in the supplemental mortgage of January 5, 1884, it is provided that the officers of the land department of either railway may act for the trustees in the sale of lands (R., 292), and that the trustees may convey the lands without the joinder in the deeds of either the New Orleans Company or the appellee (R., 295).

It may well be argued from these instruments, showing the interchangeability of the two names, or, we might say the standardization of parts, that the equity of redemption of the New Orleans Company passed to the appellee, at least in equity if not at law. It may also be noticed that when Mr. Wheelock writes to the Department of the Interior after the merger he writes upon the stationery of the appellee (R., 138).

The act of 1887 expressly required action on the part of the stockholders of the New Orleans Company. Section 3 provided for the relinquishment and confirmation of the lands to the New Orleans Company whenever the Secretary of the Interior is notified that the latter company "through the action of a majority of its stockholders, has accepted the provisions of this act and is satisfied that said company has accepted and agreed to discharge all the duties and obligations imposed upon the Baton Rouge Company by the act of March 3, 1871" (24 Stat., 392).

The meeting at which this approval was given showed present 67,000 shares of 67,200 outstanding (R., 167). It may not be doubted that the 67,000 shares represents the holding of appellee.

December 26, 1911, Mr. Satterlee, secretary and treasurer of appellee, refers to the fact of appellee's absorption of the New Orleans Company, and that it was made a part of appellee's main line (R., 172).

Upon these facts, the law is settled that appellee is directly responsible for its acts performed in the name of the New Orleans Company.

In *Galveston, etc., R. Co. vs. Cowdrey*, 11 Wall., 459, purchasers of the railroad, being somewhat doubtful of their title, organized a new corporation with the same name, then organized a junction railroad and a real estate corporation, and by contracts among the several corporations so arranged that the railroad company itself would earn little, if any, money. The idea was that if their title was bad they would not have to account. This court held the corporations virtually one, saying:

"It was admitted by the defendants that the stockholders of the new Galveston Railroad Company, the stockholders of the Junction Railroad Co., and the members of the Real and Personal Estate Association were identically the same persons, and that their several interests were proportionally the same in each concern. It was evident, therefore, that the bargains

made with the Galveston Railroad Company were bargains made with themselves, and were what they were pleased to make them; and the design manifestly was to make them on such terms that the Galveston Railroad Co. should get but a small share of the proceeds" (467).

In *Southern Pacific Terminal Co. vs. Interstate Commerce Commission*, 219 U. S., 498, the question was whether the Terminal Co., which was controlled through stock ownership by the Southern Pacific Company, was amenable to the Interstate Commerce law. This court said:

"Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the terminal company is a wharfage company, or the Southern Pacific a holding company. Verbal declarations cannot alter the facts" (p. 521).

In *United States vs. Union Stock Yard Company*, 226 U. S., 286, 306, the question was whether the Union Stock Yards and the Chicago Junction Railway were common carriers, and within the Interstate Commerce law. Practically all of the stock of each company was held by a third corporation. This court held them to be subject to the law, saying:

"We think that these companies, because of the character of the service rendered by them, their joint operation and division of profits, and *their common ownership by a holding company* are to be deemed a railroad within the terms of the act of Congress to regulate commerce."

In *United States vs. Milwaukee Refrigerator Transit Co.*, 142 Fed., 247, the charge was that the majority of the stock

in the Refrigerator Company was owned by controlling stockholders of the Pabst Brewing Company; that the latter by contract gave the former exclusive control of the shipment of its beers; that the Refrigerator Company owned a number of refrigerator cars, and would only ship over those railroads which allowed certain rental for its cars; that this was a device for the payment of rebates in violation of law.

In overruling a demurrer to a petition in equity to enjoin a continuation of this practice, Sanborn, D. J., discusses the subject of corporate identity or control. He says:

"It is true that for certain purposes the law will recognize the corporation as an entity distinct from the individual stockholders; but that fiction is only resorted to for the purpose of working out the lawful objects of the corporation. It is never resorted to when it would work an injury to any one, or allow the corporation to perpetuate a fraud upon anybody. * * *

"But when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. * * * Can it be doubted that there really is, in substance and effect, an identity of interest, or that the brewing company, considered as an association of individuals, really owns and controls the transit company?" (254-5).

On appeal, 145 Fed., 1007, it was held that the proof did not show control by the Brewing Company. The case was affirmed on the ground that the Refrigerator Company itself became a shipper.

In *New York Trust Company vs. Bermuda Company*, 211 Fed., 989, a Canadian corporation was organized to hold title to a steamship, so as to evade our law. All the stock belonged to the New York Trust Company, and it had the actual management of the boat as well as of the Canadian Company. In holding that the court would look to the sub-

stance of the matter, irrespective of form, Hand, D. J., stated:

"There is nothing merely in the fact that you have adopted a corporate form which prevents you from so interjecting yourself into the corporate business as to become the principals, though the form remain corporate (citing *United States vs. Union Stock Yards, supra*)."

In *Kendall vs. Klapperkhal Company*, 202 Pa. St., 596, the Klapperkhal Company owned certain mountain land, in the development of which it was found advisable to form several other corporations, the stockholders of all being the same. By personal endorsement, the directors raised thousands of dollars for the development of the several corporations. One of the enterprises proved profitable, and the directors repaid themselves from it for all advancements. Kendall, a stockholder, objected. It was held that all the corporations were practically one, and the action of the directors was proper.

In *re Muncie Pulp Company*, 139 Fed., 546 (C. C. A.), the Muncie Pulp Company, in order to supply motive power for the operation of its plant, bought and leased various natural gas and oil wells which it turned over to a corporation called the Great Western Natural Gas and Oil Company. Officers of the Pulp Company held all the stock of the Gas Company. The Pulp Company treated the Gas Company merely as its agent. When the Muncie Pulp Corporation went into bankruptcy, its officers were compelled to surrender the stock of the Gas Company.

In *re Rieger, Kapner and Altmark*, 157 Fed., 609 (Dist. Ct., Ohio.) Rieger, Kapner and Altmark, a partnership engaged in selling certain manufactured articles on commission, were forced into bankruptcy. The partners held 99 per cent of the stock of the corporation whose products they sold. Holding that they were also the corporation, the court said (p. 613):

"The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud." (Citing numerous cases.)

Exploration Mercantile Co. vs. Pacific, etc., Co., 177 Fed., 825, 829, contains an interesting discussion of when the courts will disregard the fiction of corporate entity.

In *Harrington vs. Atl. and Pac. Tel. Co.*, 143 Fed., 329, 337, it was held that Jay Gould, the principal stockholder in the corporation defendant, was individually responsible for the infringement of patents which he had caused that company to commit.

VII.

The right of way and alternate sections were charged with a trust in favor of the bondholders. Appellee with full knowledge of such trust obtained possession of all the lands. Appellee thereby took the place of and became the express trustee. Having disposed of the trust property, in substantial accord with the trust and paid off most of the bonds, it will be compelled in equity to completely perform and pay the remainder of the bonds.

It will be remembered that the right of way is still in the possession of appellee, and that only the alternate sections were handled in the name of the New Orleans Pacific.

The lands acquired from the Government were impressed with a trust for the benefit of the bondholders. This trust arises out of the mortgage and deed of trust of September, 1872 (R., 57).

While this instrument undertook to convey to the Union Trust Company the legal title to all of the Baton Rouge Company's property, both present and future, the railroad company was left in possession and operation thereof until

default (R., 65). In case of default, action could be taken only by the holders of a majority in interest of the outstanding bonds, or of at least 1,000 bonds then outstanding (R., 66, 67). Control of 1,183 of the 1,275 bonds was early acquired by appellee (R., 298).

The Baton Rouge Company was to dispose of the lands for the purpose of paying off the bonds; it was to make a schedule of the lands with the selling price of each parcel, and had the right to revise this list once a year.

The railroad, with the written consent of the trustee, was authorized to sell and convey such lands as were not needed for its operation, and the Trust Company was to join with the railroad in deeds to such parcels. The net proceeds thereof were to be appropriated to a sinking fund for the redemption of the bonds (R., 71-73). This fund was to be augmented on June 1, 1880, and each year thereafter, by one per cent of the gross earnings of the railroad (R., 76).

This trust instrument, therefore, conveyed the legal title to the property to a separate trustee, but left the possession and equitable title with the trustor upon certain trusts declared and to be performed by it or its successors. The result was that both the railroad and the Trust Company were expressly made trustees each for the purposes set forth. Among other things, the railroad agreed to cause the bonds to be paid and to cause to be done all things necessary to preserve and keep valid the lien hypothecation or encumbrance thereby created (R., 77).

As a result of this instrument, the right of way and other lands received from the United States were indelibly impressed with the trusts therein set forth. And this applied to the alternate sections whether acquired by the Baton Rouge Company or its successors (R., 64).

But, aside from this, the rule is settled that when a person acquires property with notice of a trust, he is bound thereby.

Pomeroy thus states the rule:

"A purchaser with notice of a trust, either expressed or implied, becomes himself a trustee for the beneficiary with respect to the property, and is bound in the same manner as the original trustee from whom he purchased" (sec. 688).

Again:

"Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee, not in the course of executing and carrying into effect the terms of an express trust, or devolves from a trustee to a third person, who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary" (sec. 1048).

Lewin on Trusts, page. 279:

"It is a universal rule, as trusts are now regulated, that all persons who take through or under the trustee shall be liable to the execution of the trust."

In *Mechanics Bank vs. Seton*, 1 Pet., 299, stock stood on the books of the bank in the name of a person who, to the bank's knowledge, held in trust for Seton. The bank sought to hold the stock for the payment of the trustee's debt. This court held that notice of a trust draws after it all the consequences of an expressed declaration of the trust, saying:

"It is a well-settled rule in equity that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees and bound with respect to that special property to the execution of the trust."

In *Union Pacific R. Co. vs. McAlpine*, 129 U. S., 305, the railroad company was compelled to perform a contract to

exchange real estate made by its predecessor with McAlpine. This court said:

"Whenever property charged with a trust is conveyed to a third person with notice, he will hold it subject to that trust, which he may be compelled to perform equally with the former owner."

In *Saunders vs. Dehew*, 2 Vernon, 270, it is said:

"Though a purchaser may buy in an incumbrance, or lay hold of any plank to protect himself, yet he shall not protect himself by the taking of a conveyance from a trustee after he had notice of the trust, for by taking a conveyance with notice of the trust, *he himself becomes the trustee*, and must not, to get a plank to save himself, be guilty of a breach of trust."

In *Mansell vs. Mansell*, 2 P. Wms., 678, 681, it is said:

"But even in the case of a purchaser, if the purchaser had notice of the trust which the trustees were subject to as annexed to their estate, such notice would have made him liable to the same trust; so if there had been a voluntary conveyance made of this estate, though without notice, the voluntary grantee would have stood in the place of the grantors and have been liable to the trust *in the same manner as the trustees themselves were*."

In *Adair vs. Shaw*, 1 Schoale & Lefroy Ch., 242, 262, Lord Chancellor Redesdale said.

"If we advert to the cases on this subject, we shall find that trusts are enforced, not only against those persons who rightfully are possessed of the trust property as trustee, but also against all persons who come into possession of the property bound by the trust with notice of the trust; and whoever so comes into possession is considered as bound with respect to that property to the execution of the trust."

In *Boursot vs. Savage*, L. R. 2 Eq. 134, Savage purchased certain property standing in the name of Holmer and two others who actually held it in trust. Holmer, who acted as Savage's solicitor in the matter, forged the names of his co-trustees to the deed. On a suit by the beneficiary for a reconveyance, Kindersley, V. C., thought there was sufficient evidence to put Savage on notice of the trust, and ordered a reconveyance. In discussing the matter, he said:

"Take the simplest case: Suppose the purchaser's solicitor happens, by reason of his connection with the property, to be aware that the vendor has created an equitable mortgage. Is it possible to contend that the purchaser would not be held to be affected with constructive notice of the existence of such mortgage?"

In *Indiana I. & I. R. Co. vs. Swannell*, 156 Ill., 616; 30 L. R. A., 290, 294, one Cushman, by agreement with the bondholders and acting as their trustee, bid in at auction the road on which their bonds were secured. Some of the bondholders failed to comply with the agreement. Cushman, however, perfected the purchase. Instead of issuing new bonds, he sold the property to the I. I. & I. R. Co.

Swannell and other bondholders sued that company to recover the value of the bonds which should have been issued to them. Held, that the railroad company took with notice of the trust, and was responsible for the value of the bonds.

"The railroad company simply stepped into Cushman's shoes, and Swannell has the right to follow the property and hold the company as his trustee.

"The doctrine is that a purchaser with notice of a trust, either express or implied, becomes himself trustee for the beneficiary with respect of the property, and is bound in the same manner as the original trustee from whom he purchased—and this even though he is a purchaser for a valuable consideration."

So in *Life Ass'n, etc., vs. Siddall*, 3 De G. F. & J., 58, it was said:

"Grace Turner, although not a trustee or legally representing the trustee named in Spencer's will, assumed to act and acted as a trustee under the will. If she had by writing declared herself to be a trustee the trust in her could not have been otherwise than express and her conduct is equivalent to her written declaration" (72).

We have thus shown that the Baton Rouge Company created a trust of which the lands granted by the Government were the subject. The alternate sections were to be sold as rapidly as they could and their proceeds used for the payment of appellant's bonds. The right of way and the railroad upon it and the income therefrom were also subject to the trust, but they were to be a last resort. They were to be so used in the meantime as to create a sinking fund, which, together with the proceeds of the alternate sections, should pay the bonds.

We have also shown that appellee acquired possession of the property with knowledge of this express trust, and under the rules of equity thereby became the trustee in place of the Baton Rouge Company, and liable to the same extent as that company. Having sold much of the trust property, though not in strict accord with the terms of the trust, the effort here is to compel it to completely perform the trust and pay these bonds.

The appellee by its actions has recognized the trust, and is now estopped to deny it.

The mortgage of 1883, given by the New Orleans Company to Dillon and Alexander, expressly stated that it was for the purpose of providing the means of payment for the land grant (R., 260). The action of these trustees later in purchasing most of the bonds was a practical construction, showing conclusively that payment for the land grant meant paying off the prior lien of 1872. The new deed covered all

the alternate sections granted to the Baton Rouge Company by the act of March 3, 1871, estimated to contain from 1,500,000 to 2,000,000 acres of land (R., 264).

This mortgage was not in opposition to the trust instrument of 1872. Senator Van Wyck on May 5, 1883, in a letter to the Secretary of the Interior objecting to the issue of patents until Congress should pass on the forfeiture, after speaking of the execution of the Dillon mortgage, said:

"Two trustees are named, one in the interest of the present company [the New Orleans Pacific Company] and one in the interest of the bonds issued twelve years ago [of 1872]." (See Senate Executive Doc. 31, 48th Congress, 1st Session, 98.)

The trust was again recognized by the application of the New Orleans Pacific Company for the issue of patents to it, as assignee and successor of the Baton Rouge Company. The claim was based on the proposition that the building of the road by it was in law the building of the road by the Baton Rouge Company. Pursuant to this claim, patents were issued March 3, 1885, to the New Orleans Company for over 679,999 acres (R., 186).

Finally, after the passage of the confirmatory act of 1887, Secretary Vilas held that the acceptance by the stockholders of the New Orleans Company of the provisions of that act was an acceptance of an undertaking and obligation on the part of the New Orleans Company "to protect all persons holding obligations or demands against" the Baton Rouge Company (8 Land Dec., 27).

The patents concerned in this decision were then issued, August 8, 1889, to the New Orleans Company (R., 230, 186). Between that date and June 5, 1897, additional patents were issued until the total was over 981,000 acres (R., 187). And patents are still being issued, the last so far as we know in 1916.

By the acceptance of these patents to it as assignee of the

Baton Rouge Company, after the secretary's decision, the appellee—which was the principal stockholder of the New Orleans Company—expressly accepted the secretary's ruling that it was responsible to all persons holding obligations or demands against the Baton Rouge Company.

In accordance with the trust, Messrs. Dillon and Alexander, the trustees under the 1883 mortgage, who were actively selling the alternate sections, used the proceeds thereof to purchase 1,183 bonds of the issue of 1872, or 9/10 of those which had been issued (R., 245).

By the acceptance of the patents issued after the decision of Secretary Vilas, the appellee is estopped to deny its acceptance of the conditions imposed by him. It was the duty of appellee either to accept the patents upon those conditions, or to reject them. It could not accept the patents and reject the conditions.

In *Rogers Locomotive Machine Works vs. American Emigrant Company*, 164 U. S., 559, a dispute arose over the title to certain lands in Iowa which both parties claimed from the State of Iowa. The Emigrant Company asserted that the lands were swamp lands and should have come to the State under the swamp land act. The Rogers Company asserted that the lands came to the State under a grant in aid of railroads. In fact the Secretary of the Interior decided that the lands inured to the State under the railroad act, and patents were issued under this decision and accepted by the State. This court held that it was the duty of the State at that time either to accept the lands as tendered or to claim them as swamp lands; that by its acceptance of the lands as granted, it was estopped to deny that they came under the railroad act. Of course the grantee of the State was bound by its estoppel.

Appellee having sold many of the alternate sections, though not in strict accord with the trust instrument, and having paid off most of the bonds of 1872, appellants here seek to compel the final step in the execution of the trust,

namely, the payment to them of the amount due on their bonds. Having paid off over \$1,500,000 of the bonds of 1884, which were subordinate to those of 1872, and still having in its possession some 260 miles of right of way and railroad subject to the trust instrument, no question of accounting arises.

VIII.

By the merger of the New Orleans Company with appellee the latter became liable to pay the bonds.

(1) THIS IS TRUE UNDER THE ACT OF 1871 CHARTERING APPELLEE.

The act of March 3, 1871, incorporating appellee, in § 4, gave it power to consolidate with other roads on the route prescribed in the first section of the act; § 6 provided that on such consolidation appellee should assume the legal obligations of the companies so consolidated.

Appellants contend that the merger with the New Orleans Company took place under § 4, and that thereby appellee became liable for the indebtedness and other legal obligations of that company.

Appellee, on the other hand, insists that the road of the New Orleans Company was not on the route prescribed in § 1 of the act of 1871. According to that act the road ended at Marshall, Texas, but by the act of 1872 it was extended to Shreveport. Counsel for appellee argue that it had merged with the Southern Pacific Company of Texas and the Southern Transcontinental Railway Company, which merger was approved by the act of Congress of June 22, 1874 (18 Stat., 197). They argue that under the charters of those companies the appellee acquired power to purchase lines extending eastwardly to the Atlantic Seaboard.

The route of the New Orleans Company was from New Orleans to Baton Rouge, thence to Shreveport or to Marshall

or Dallas, in the State of Texas (Charter Act, Feb'y 19, 1876, Laws of Louisiana, 1876, p. 30). While it was not on the route of appellee as originally prescribed by the Act of 1871, it was on that route when the latter was extended to Shreveport by the supplemental Act of 1872. The two roads then overlapped for the distance between Marshall and Shreveport. The merger of appellee with the New Orleans Company was then in strict accord with the Act of 1871. It was so held by Judge Pardee in *Allen vs. Texas & Pacific Ry. Co.*, 25 Fed., 513, 515. The conditions of appellee's charter then attached.

The charters of the other companies relied on by appellee are not before the court, and it is not apparent what franchises they possessed, but even if the franchises so acquired also authorized the merger with the New Orleans Company, appellee would not be free from obligations of its Federal charter. The proper construction of the Act of 1871 is that the appellee was to be responsible for the debts and obligations of any corporations with which it merged. Appellee's power to merge with other corporations came from the act of 1871. That act imposed certain conditions, to be attached to certain mergers. These conditions cannot be escaped by contending when one merger has taken place that all subsequent mergers are made, not under the original charter, but under the franchises of the corporation first acquired. If this was so, it would be an easy matter to defeat altogether § 6 of the act of 1871.

The New Orleans Company, in 1881, took over all of the property and assets, as well as practically all the stock, of the Baton Rouge Company. Being the stockholder, and having possession of all the property, it could not eliminate the debtors, but became itself responsible for the payment of their debts.

When the merger took place with appellee, appellee then became the holder of all the property and assets of the Baton Rouge Company, and practically the only stockholder

therein. It then became liable, under § 6 of its charter, for these debts and obligations of the New Orleans Company.

(2) LIABILITY TO PAY THE BONDS ATTACHES UNDER THE PRINCIPLE OF *NORTHERN PACIFIC RAILWAY COMPANY vs. BOYD*, 228 U. S., 482.

The case at bar is entirely within the principle of *Northern Pacific R. Co. vs. Boyd*, 228 U. S., 482. There the Northern Pacific Railroad Company, having control of the Cœur d'Alene Company, caused that company to issue some \$465,000 of bonds, and diverted the same to its own use. The Northern Pacific Railroad was held responsible for this diversion. Before *Boyd*, a creditor of the Cœur d'Alene Company, could put himself in a position to reach the assets of the Northern Pacific Railroad, the latter went into the hands of receivers, and its property was subsequently transferred to the Northern Pacific Railway Company, with the same stockholders. The claims of some of the unsecured creditors, amounting to \$14,000,000, were also bought in by the stockholders.

It was held that the property of the Northern Pacific Company was a trust fund for all creditors, and any creditor could assert his superior rights thereto against the stockholders of the company.

In the present case, the land grant and right of way belonged to the Baton Rouge Company. The New Orleans Company came into control of the Baton Rouge Company, acquiring practically all of its stock and transferring the land grant to itself. The New Orleans Company thus being the stockholder of the Baton Rouge Company, could not acquire a right in the latter's assets superior to the claims of the creditors.

This transaction constituted a diversion of all the assets of the Baton Rouge Company and an appropriation of same by the New Orleans Company to its own uses, and rendered

it liable to these bondholders (as creditors) to the full extent of the assets so diverted and appropriated.

The transaction rendered the Baton Rouge Company insolvent and the stockholders of the company received the benefit of the transfer.

The entire transaction was engineered and consummated by Wheelock, President of the New Orleans Company, by securing control of 42,500 shares out of the total 50,000 shares of the Baton Rouge Company.

The case, therefore, falls directly within the principle of the Boyd case, above cited.

So when appellee merged the New Orleans Company with itself, and became practically the only stockholder therein, appellee substituted itself in the place of the New Orleans Company, and became equally responsible for the debts of the Baton Rouge Company. It became really practically the only stockholder in the Baton Rouge Company, and received all of the latter's property.

However, the principle of this case but works out the same conclusion already reached, namely, that appellee became substituted as the trustee under the instrument of 1872; that it has sold practically all of the trust property, though it still has some in its possession; that it has paid off most of the bonds, and will now be compelled by a court of equity to pay the remainder.

IX.

The statute of limitations is no bar to this action.

(1) THE STATUTE OF LIMITATIONS WAS NOT RELIED UPON IN THE ANSWER, AND THEREFORE CANNOT BE AVAILED OF.

(a) *Federal courts will require limitations to be pleaded, if such is the local law.*

Courts of the United States, in the absence of legislation on the subject by Congress, recognize the statutes of limitations of the States, and give them the same construction and effect as are given by the local tribunals. The Federal courts will require limitations to be pleaded, if such is the local law. *Bauserman vs. Blunt*, 147 U. S., 647; *Sanger vs. Nightingale*, 122 U. S., 176; *Hanchett vs. Blair*, 100 Fed., 817 (C. C. A.); *Belleville Bank vs. Winslow*, 30 Fed., 488.

It therefore becomes important to ascertain the statute of limitations of New York and how the same may be raised in the pleadings.

We say the statute of limitations of New York, because that is the only one applicable here. While it is true that section 390-a of the New York Code of Civil Procedure provides that a cause of action arising out of the State shall be brought within the time limited by the laws of the State where the cause arises, such provision is not applicable where the cause of action is upon contracts to be performed in the State of New York. The bonds in this case were payable in New York or London at the option of the holder (R., 59). The rule is that a contract will be construed according to the law of the place where it is to be performed.

Story Conflict Laws, Sec. 280; 12 Corpus Juris, 450.

The cause of action arose as much in New York as outside of New York. The bonds, upon which the suit is based, not

only are payable in New York, but were certified in New York by the Union Trust Co., an act essential to their validity. Again, the transfer of the trust property from the Baton Rouge Company to the New Orleans Company was authorized by the directors of the former at a meeting held in New York, and the formal conveyance was executed in New York (R., 84, 223).

(b) *Under the New York law limitations must be expressly pleaded.*

In common-law actions the defense should be raised by a technical plea. In equity actions it was raised by plea or answer. The Code abolishing the distinction between law and equity provided that the objection should be raised by answer.

"The objection that the action was not commenced within the time limited can be taken only by answer."
(Sec. 413, Code Civil Procedure.)

As early as 1816, in *Dey vs. Dunham*, 2 Johns. Ch., 182, 191, Chancellor Kent said:

"It is equally settled that the defendant cannot avail himself of the time limited in the statute of usury—which defense his counsel suggested at the hearing—for the statute of limitations must either be pleaded or insisted on by the answer to entitle the party to the benefit of it, though the court will often in the case of stale demands take the time in the statute as a guide to its discretion" (citing Lord Hardwick in *Prince vs. Heylin*, 1 Atk., 493).

In *Van Hook vs. Whitlock*, 2 Edw. Ch., 304, 307, Lord Hardwick's decision is again cited, and it is said that this is now the general rule, citing Mitford, 4th ed., 273.

In *Jackson vs. Varick*, 2 Wend., 294, the court says:

"The rule is uniform that if a party neglects to plead the statute of limitations he loses his plea. The

statute of limitations is a strict defense, and if the party lets it slip, the court will not relieve him."

The Code provision is equally applicable to those actions formerly brought in equity and to actions at law.

Bihin vs. Bihin, 17 Abb. Pr., 19.

Sands vs. St. John, 33 Barb., 633.

Sears vs. Shafer, 6 N. Y., 268, 274.

(c) *The rule adopted in New York is so general that this court has applied it without reference to State decisions.*

In *Sullivan vs. Portland Railroad Co.*, 94 U. S., 811, this court said:

"The defense of the statute of limitations is not set up by plea nor in the answers. We cannot, therefore, consider the case in that aspect."

Wilson vs. Anthony, 19 Ark., 16.

Wilson vs. Anthony is a leading case upon the subject, and the authorities will be found collected in it.

In *Gormley vs. Bunyan*, 138 U. S., at 635 it is said:

"The only way in which the statute of limitations are available as a defense is when they are at the proper time specially pleaded."

We do not wish to be understood as contending that the defense of laches must be pleaded. Our proposition is that the statute of limitations cannot be applied unless it is specially raised in the answer. The answer in this case raises only the question of laches.

That this was the decision of the Court of Appeals below (R., 347) appears from the opinion of Judge Hough in *Bogert vs. Southern Pac. Co.*, decided July 2, 1917, 244 Fed., 61, 66:

"The statute of limitations was not pleaded; this we have said is not essential in equity (*Waller vs. Texas, etc., R. Co.*, 229 Fed., 292), meaning that the advan-

tage of measuring by the statute a plaintiff's negligence in pursuit does not rest on pleading. If the act is relied on as a bar it must be pleaded."

(2) THE STATUTE OF LIMITATIONS IS NOT APPLICABLE TO AN EXPRESS TRUST.

That this is an express trust we have already shown. Appellee acquired the property with full knowledge of the trust and became the express trustee. It has executed many provisions of the trust. True, its sales of the lands were not in strict accord with the terms of the trust, but appellants have made no question of that.

"The rule is well settled that in actions by a *cestui qui* trust against an express trustee, the statute of limitations has no application, and no length of time is a bar."

New Orleans vs. Warner, 175 U. S., 130.

Oliver vs. Piatt, 3 How., 333, 411.

Gisborn vs. Charter Oak Ins. Co., 142 U. S., 326, 338.

It is true that if the trustee disavows the trust, and knowledge thereof is unequivocally brought home to the beneficiary, limitations may begin to run.

Oliver vs. Piatt, *supra*, 411.

The burden of showing both disavowal of the trust and notice thereof to the beneficiaries would seem to be on the trustee.

Here there has been no disavowal nor any notice of a disavowal made known to appellants.

On the contrary, as already appears, appellee acquiesced in the trust, declared that the mortgages of 1883 and 1884 were to raise money to pay for the land grant, and permitted the purchase of nine-tenths of these bonds from the proceeds of the sales of the lands.

The suit by Dillon and Alexander in 1890 was not a dis-

claimer by the trustee. It is true the New Orleans Company and the Union Trust Company were made defendants, but neither of them appeared (R., 301).

Nor was any notice of this suit brought home to appellants or their testator. The suit was quietly filed in the Federal court in Louisiana; apparently there was not even an advertisement against any of the parties, and the decree was not reported. Appellants' father lived in Pennsylvania, and apparently never heard of this suit. Appellants themselves first learned of this suit in 1909 (R., 56).

(3.) THE PERIOD OF LIMITATIONS, IF ANY IS APPLICABLE, IS TWENTY YEARS.

We may eliminate the Louisiana statute of limitations. These bonds were payable in London or New York, at the option of the holder. The holders have seen fit to bring this suit in New York. Ordinarily, the law of the place where the suit is brought governs limitations. This is particularly true if the contract is made payable in that jurisdiction.

The following provisions of the New York Code of Civil Procedure are to be considered:

Sec. 380. The filing of action must be commenced within the following periods after the cause of action has accrued.

Sec. 381. Within twenty years. An action upon a sealed instrument.

Sec. 382. Within six years. An action upon a contract liability, express or implied; except a judgment or sealed instrument.

Sec. 388. An action the limitation of which is not specially prescribed under this or the last title must be commenced within ten years after the cause of action accrues.

The trial court was of the opinion that the action was governed by the six-year rule of section 382 or by the ten-year rule of section 388 (R., 343).

In their brief below, counsel for appellees say:

"The suggestion in the appellee's brief that the statutes of limitations are inapplicable because the suit was brought to enforce an express trust might conceivably be made if the suits were against the mortgage trustee to enforce the trusts of the mortgage, but we fail to see its application to a suit against the Texas and Pacific Railway Company" (Brief, pp. 16, 17).

We have already shown that by the trust instrument of 1872 both the Union Trust Company and the Baton Rouge Company were made trustees of an express trust (*supra*, Point VII). That trust was impressed not only upon the alternate sections but upon the right of way, whether acquired by the Baton Rouge Company or by its successors (R., 64).

The alternate sections were to be sold by the Baton Rouge Company, and the net proceeds thereof, as well as 1 per cent of the gross receipts of the railroad built on that right of way, were to constitute a sinking fund for the payment of the appellants' bonds.

We have already shown that appellee has succeeded to this express trust declared by the Baton Rouge Company, and it thereby became the trustee, occupying for all purposes the same position as the Baton Rouge Company.

If appellee is correct in stating that limitations would be inapplicable to the original trustee, it follows that limitations do not apply to appellee, its successor.

But if any period of limitations applies, it is the twenty-year period under section 381. This suit was brought upon sealed instruments, for the payment of which appellee has made itself liable. It has taken the place of the Baton Rouge Company.

X.

Appellants were not guilty of laches.

Appellee here plainly raised this defense.

What are the facts?

Appellants' testator died in 1893 (R., 56). The bonds matured September 4, 1902. Only 1,275 were issued. Before 1890, appellee had acquired 1,183. Action for non-payment of interest could only be taken by the holders of 1,000 bonds, or of a majority of those outstanding. Clearly, therefore, the elder Waller was not chargeable with laches before his death, nor could his sons act until 1902.

In 1908 they filed a bill in the United States District Court in Louisiana to collect these bonds, and it is still pending there, undisposed of (R., 56).

Until the filing of the answer in that case in 1909 appellants were ignorant of the merger of the New Orleans Company with appellee and of the suit filed in 1890 by Dillon and Alexander (R. 56). Their ignorance is easily understood when it appears that the merger agreement, while filed in the office of the Secretary of State of Louisiana, was recorded in the Book of "Messages and Proclamations" (R., 230).

The present suit was filed in May, 1913 (R., 19).

The delay in filing suit has caused no change whatever in the position of appellee. There has been no increase in the value of the property. The right of way has been used for the same purposes as a railroad, since the railroad was completed in 1882. The alternate sections have been sold from time to time, substantially as was originally intended. The trust as to them was alive and continuing at the time of the filing of the bill. While 1,000,000 acres had been patented, perhaps as much more was still due under the grant (R., 10; 264). As late as 1916 patents

were still being issued to the New Orleans Co. to the alternate sections (Report of Secretary of Interior for 1916, p. 114).

No testimony has been lost. The elder Waller died before the bonds matured. It does not appear that appellee would have used him as a witness.

In short, appellee's position is the same as it was in 1881—except that it has in the meantime proceeded with the execution of the trust, and itself realized the benefit thereof. It has paid most of the bonds. Appellants, not appellee, have suffered by being deprived of their money.

Under these facts, appellants were not guilty of laches.

The rule is settled that to constitute laches there must be two things—unexplained delay in bringing action and such a change in the defendant's position as to make it inequitable and unjust to grant relief. Mere delay without prejudice is not enough to constitute laches. The defense will not be sustained if to do so will be inequitable. 3 Page on Contracts, Sec. 1707.

A recent case in this court is *Northern Pacific Ry. vs. Boyd*, 228 U. S., 482. The court said, through Mr. Justice Lamar (pp. 509, 510):

"The doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another, and *unless the non-action of the complainant operated to damage the defendant or to induce it to change its position, there is no necessary estoppel arising from the mere lapse of time.* *Townsend vs Vanderwerker*, 160 U. S., 171, 186.

"*In this case the defendants and their stockholders have not been injured by Boyd's failure to sue.* His delay was not the result of inexcusable neglect, but in spite of diligent effort to put himself in the position of a judgment creditor of the Cœur d'Alene

so as to be able to proceed in equity to collect his debt. * * *

"* * * Boyd's silence, in 1896, did not mislead the stockholders nor did his non-action induce them to become parties to the reorganization plan. They have not in any way changed their position by reason of anything he did or failed to do, and the mere lapse of time under the peculiar and extraordinary circumstances of this case did not estop him, when he revived the judgment, from promptly proceeding to subject the shareholders' interest in property which in equity was liable for the payment of his debt." (Italics ours.)

In *Gallagher vs. Cadwell*, 145 U. S., 368, the court said (pp. 372, 373):

"The cases proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned, and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them. * * *

"But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; *but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change on the condition or relations of the property or the parties.* (Italics ours.)

In *Halsted vs. Grinnan*, 152 U. S., 412, the court said (pp. 416, 417):

"The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. It is an

equitable defense, controlled by equitable considerations, and *the lapse of time must be so great and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them.* There must, of course, have been knowledge on the part of the plaintiff of the existence of the rights, for there can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he had no reason to apprehend." (Italics ours.)

See also *Townsend vs. Vanderwerker*, 160 U. S., 171, 186; *Noble vs. Gallardo y Scary*, 223 U. S., 65, 66.

In *London, etc., Bank vs. Dexter Horton & Co.*, 126 Fed., 593, 601, the court of appeals thus stated the law:

"One principle pervades all cases involving the defense of laches, however, and that is, that not only must there be a seemingly unnecessary delay on the part of the plaintiff in bringing or prosecuting his action, but that, by reason of some change in the condition or relations of the property or parties occurring during the period of delay, it would be inequitable to permit the claim of the plaintiff to be enforced. * * * As defined in the case of *Demuth vs. Bank*, 85 Md., 326; 37 Atl., 268; 60 Am. St. Rep., 322:

"Laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. * * * There must be a legal duty to do some act, a failure to do that duty, and attendant circumstances which cause prejudice to an adverse party, before the doctrine of laches can be successfully invoked.'"

In *Hanchett vs. Blair*, 100 Fed., 817, 827, there was a delay of fourteen years after the maturity of the bonds. The defense of laches was rejected by the court of appeals on the ground that the inaction had not worked injury to any one,

and that it was not shown that there was any occasion for more promptly asserting his rights.

In *Stevens vs. Grand Central Mining Co.*, 133 Fed., 28, 32, the court of appeals refused to apply the doctrine of laches, because to do so would be inequitable. The opinion was by Mr. Justice Van Devanter. For the same reason the rule was not applied in the following cases:

Wilson vs. Plutus Mining Co., 174 Fed., 317, 321 (C. C. A.).

Sullivan vs. Ellis, 219 Fed., 694, 698 (C. C. A.).

Wheeling Bridge Co. vs. Reymann Brewing Co., 90 Fed., 189, 195.

Old Colony Trust Co. vs. Dubuque, etc., Co., 89 Fed., 794, 807.

Bogert vs. Southern Pac. Co., 244 Fed., 61, 64 (C. C. A.).

In *Schwartz vs. Loftus*, 216 Fed., 320, 326, nothing appeared in the case except lapse of time. The court refused to apply the doctrine of laches.

In 18 Enc. of Law, 2d edition, 101, the rule is thus stated:

"So long as the relative positions of the parties was not altered to the defendant's prejudice, delay is of little consequence."

Among the numerous cases cited the following are directly in point:

Richardson vs. Green, 61 Fed., 423 (C. C. A.).

Gibbon vs. Hoag, 95 Ill., 45, 69.

Daggers vs. Van Dyck, 37 N. J. Eq., 130, 137.

Newman vs. Newman, 152 Mo., 415.

Hamilton vs. Dooly, 15 Utah, 280, 282 (containing an excellent discussion).

In *Wollaston vs. Tribe L. R.*, 9 Eq., 44, where there had been a delay of ten years, Lord Romilly, M. R., said:

"Great stress was laid on the lapse of time; but I think nothing of that, because all the persons interested are in the same state now as they were then. If there had been any dealing which had altered the state of matters, that might have raised a question; but there is nothing of the sort."

XI.

The default decree of 1890 is not effective to defeat the claim of appellants here.

The bill in this case charges that the decree of 1890 was the result of an effort on the part of appellee and its associates to remove the alternate sections from the operation of the trust deed of 1872 (R., 14-17). One of the objects of this bill is to hold that this decree of the Federal court is not effective to defeat the relief prayed by appellants. We contend that it was not obtained in good faith, and for that reason is not binding upon appellants. That suit did not attempt to reach the right of way now occupied by appellee, but sought to affect only the alternate sections.

Appellee, on its part, pleaded the decree in that case as a former adjudication, which it asserted was binding on appellants. It bases its contention on the ground that the Union Trust Company was a party to the suit and bound thereby, and that the beneficiaries under the deed of trust to the Union Trust Company are equally bound with it. One answer is that the decree was not obtained in good faith. All of the cases relied on by appellee insist that the decree obtained by or against the trustee shall have been in good faith and without fraud. In fact, most of those cases were attempts to foreclose mortgages by the trustee; usually the trustee actively prosecuted or defended, the bondholders had notice and received their *pro rata* of the funds realized. No case, however, will be found like the present, where the trustee defaulted, and one of the bondholders who had

been brought in as a defendant was summarily dismissed before the decree was obtained.

Appellee, in view of its position as to the rest of the case, that it is not responsible for the acts of the New Orleans Pacific Company, has some difficulty in availing itself of what it contends is a binding decree against that corporation. Appellee finally takes the position that inasmuch as it is sued upon an alleged liability of the New Orleans Company it is entitled to plead in bar any decree which would be available to the latter company as the primary debtor (Brief below, 23).

We will not emulate their inconsistency, but will admit that this decree has the same effect as to appellee that it has as to the New Orleans Company.

The latter company could not plead that decree in estoppel. Both it and the Union Trust Company were parties defendant to the suit. There was no issue between them in that case. The Baton Rouge Company was also made a defendant. All three defaulted. Even if the default decree might be pleaded as a bar in litigation between Dillon and Alexander and the bondholders, it cannot be pleaded as between any of the three corporate defendants. Appellee here takes the place of the New Orleans Company. Appellants claim under both the Baton Rouge Company and the New Orleans Company. It is absurd to say that by letting this decree go against itself by default the New Orleans Company was creating an estoppel in its own favor as against all persons who might claim under it or either of its codefendants, and particularly against appellants, whom it was bound in equity to protect.

It is difficult to imagine a more flagrant instance of a trustee attempting to profit by its own wrong. It is as logical as asserting that one's own admission estops his adversary from denying the truth thereof.

Again, this suit does not attempt to reach the lands, the alternate sections, which were the only subject-matter of that

case. The effort here is to make the trustee complete the performance of the trust and to pay over to the bondholder the money which has been received for his benefit. That litigation did not deal at all with the balance of the trust property, the right of way.

It will be remembered that Parker, a bondholder under the deed of 1870, filed a bill in the Western District of Louisiana to foreclose. In 1888 he obtained a decree. Defendants in that case were the Baton Rouge Company, the New Orleans Company, and Messrs. Dillon and Alexander. Howe & Prentiss and Dillon & Swayne were counsel for the defendants (33 Fed., 693). The case was reversed by this court February 1, 1892. Mr. Howe and Mr. Dillon still appearing as counsel (143 U. S., 42).

While that case was pending on appeal Messrs. Howe and Prentiss, who had appeared for the defendants in the Parker case, went over to the Eastern District, and in the name of the New Orleans Company and Baton Rouge Company filed a suit against the Union Trust Company and Dillon and Alexander to have the deed of 1870 declared not to be a lien upon the alternate sections. They obtained such a decree (41 Fed., 717; R., 303).

Curiously enough, while that case was decided in 1890 and the Parker case was still pending in this court no mention is made in the opinion of the earlier contrary decision in the western district upon precisely the same issue. All the parties to this case were defendants in the Parker suit. Clearly it was an effort by them, by realigning themselves, some as plaintiffs and some as defendants, to defeat the Parker decree.

Having met with such success in the eastern district, Messrs. Dillon and Alexander, defendants in the two prior cases, proceed in their turn, but still through Messrs. Howe and Prentiss, to sue the New Orleans Pacific, the Baton Rouge Company, the Union Trust Company, and individual bondholders for the purpose of holding both the trust deed

of 1870 and that of 1872 not a lien upon the alternate sections, or in any event subordinate to the lien of the Dillon trust (R., 231, 248).

Here was a third realignment of parties and a complete reversal of their positions in the first suit in the eastern district. Counsel were taking no chances, but were going to clinch their position—at least so far as they could by friendly reciprocal decrees. It was a rotation of positions, each in turn being first plaintiff and then defendant. It was a sort of legal duplicate whist.

Really, the necessity for bringing the bill is not apparent. The bonds of 1870 had been pretty thoroughly excluded. Of the 1872 bonds, Dillon and Alexander had already bought 1,183, and they thought only about 17 others were outstanding (R., 245). One Carter held two of these bonds, and his attorney, Leonard, represented the holders of all the other bonds they could find. In a somewhat rude fashion Carter and his attorney had upset their game by bringing suit to collect the coupons on his bonds. When they endeavored to force Carter to trial he dismissed his suit, but threatened to start all over again. Since the bonds would not mature till 1902, Carter could embarrass them twice yearly by bringing suits on his coupons. The ostensible purpose, therefore, of the bill filed by Dillon and Alexander was to prevent a multiplicity of suits by enjoining this interloper from further interfering with them (R., 245, 246, 254).

The three corporations, the Baton Rouge Company, the New Orleans Company, and the Union Trust Company, now occupying the rôle of defendants, as required by the rules of their friendly game, duly defaulted. Into the Baton Rouge Company, long since absorbed by the New Orleans Company and without independent existence (R., 172), was breathed enough life to enable it to enter an appearance, which the other corporations did not do. Presumably this was to lend a little variety to the record.

Mr. Carter and the other individual defendants were still

impolite enough to vigorously contest the suit. The friendly five quickly realized that they had made a mistake by bringing in Carter and his friends. The only recourse was to eject them. This was done a year and a half later by dismissing the bill as to them (R., 302). One may fairly infer from the slight but illuminating glimpse we have of Mr. Carter that his bonds were redeemed before he was ejected.

All obstructions being thus removed the desired decree was taken by default (R., 308).

Can it be contended for a moment that this decree would be an estoppel against Carter? He had been brought in, had defended the suit, and then was dismissed.

It would be a travesty upon justice to hold that a decree obtained under such circumstances was binding on him.

It is apparent from these facts that the litigation was not one in good faith, in which the trustees defended and were defeated. There is no escape from the conclusion that it was merely a plan on the part of this appellee to try to remove the alternate sections from the trust.

Appellee relies on *Kerrison vs. Stewart*, 93 U. S., 155, 160, where it was said:

"Under some circumstances a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. He may be invested with such powers and subjected to such obligations that those for whom he holds will be bound by what is done against him, as well as by what is done by him. If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust, or to one by a stranger against him to defeat it in whole or in part."

The suit in 1890 was not brought by a stranger but by the holders of nine-tenths of the bonds, who were beneficiaries under that trust equally with appellants.

This was in reality a suit by two of the beneficiaries to

annul the trust deed. Under such circumstances they should have made all the other beneficiaries parties.

Robinson vs. Kind, 23 Nev., 330, 339.

So in a suit by stockholders to dissolve a corporation, the other stockholders are necessary parties.

McElroy vs. Gadsden, 126 Ala., 184, 192.

So the parties were not the same. There was no issue between the several defendants to that suit, and the decree is not pleadable between them.

Jones vs. Vert, 121 Ind., 140, 142.

Again, an estoppel must be mutual. Suppose the decree in that case had been against Dillon and Alexander; appellants would not be entitled to plead it here against appellee.

But, if this decree were available to appellee, at the most it amounts to a holding that the Dillon mortgage is a superior lien to that of the 1872 deed.

If this decree in any way interferes with appellants' security, the answer is that they are not here asking a foreclosure, but are demanding that the trustee who has sold the trust property pay the bonds which were originally secured thereby—that he complete the execution of the trust.

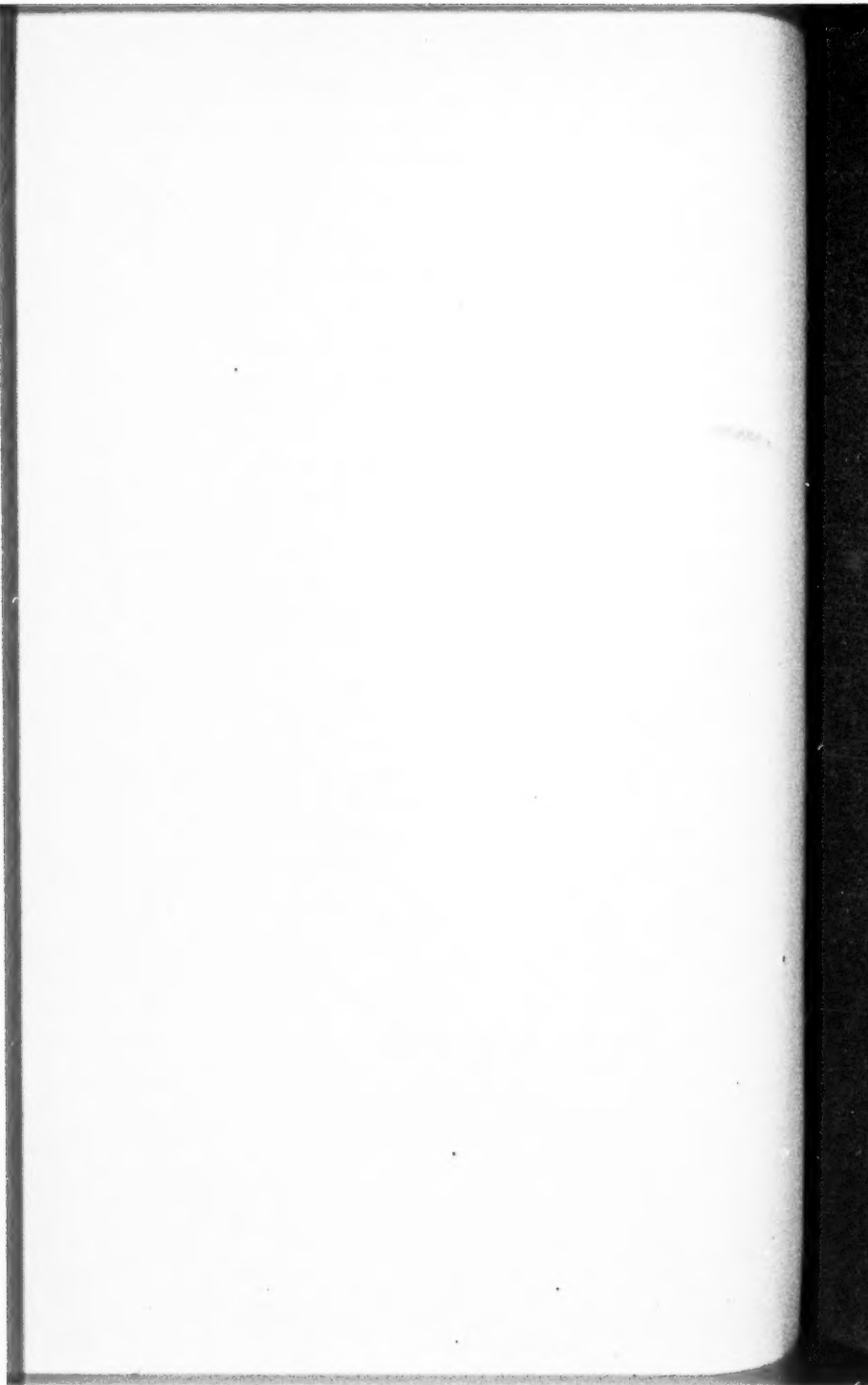
It is no defense to say that he must pay other bonds also—particularly when he still has in his possession many miles of valuable railroad property which is also subject to the trust.

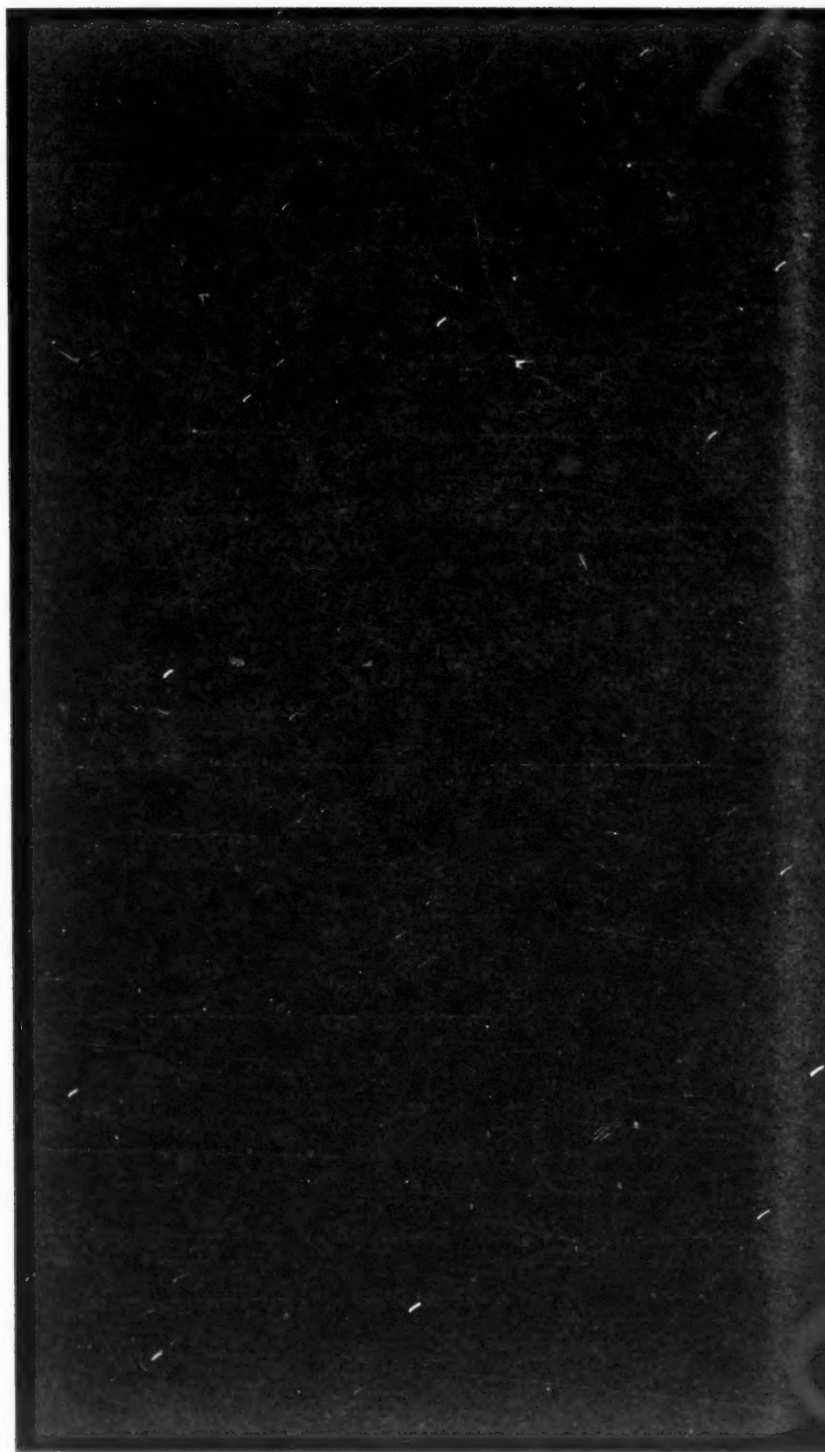
Conclusion.

The decree appealed from should be reversed and the District Court directed to enter a decree for the payment of appellants' bonds and coupons with interest thereon.

DAVID BENNETT KING,
W. RUSSELL OSBORN,
JESSE C. ADKINS,
Solicitors for Appellants.

November, 1917.





INDEX.

	Page
I. RIGHT OF WAY AND RAILROAD IN DIFFERENT STATUS FROM THAT OF OTHER PROPERTY COVERED BY DEED OF TRUST OR MORTGAGE.....	2
(a) Two Distinctly Different Estates Granted...	2
1. Grant of Right of Way Absolute Subject Only to Reverter for Non-user.....	2
2. Grant Not Forfeited by Act of February 8, 1887	4
3. Conditions Under Which Appellee Holds Prop- erty Make It Legally Liable.....	5
4. Deed of Trust Binding Upon Successors and Assigns of Baton Rouge Company.....	6
II. THE APPELLANTS ARE ENTITLED TO RECOVER, AS CREDITORS, FROM APPELLEE, THE ADMITTED HOLDER OF THE CORPORATION PROPERTY, IRRESPECTIVE OF THE DEED OF TRUST.....	10
1. In Vain for Appellee to Argue That Baton Rouge Company Did Not Earn Land Grant But That It Was Owned by the New Orleans Com- pany	14
2. Act of February 8, 1887, No Defense to Re- covery of Creditors of Baton Rouge Company..	15
3. Defense of Laches Not Available to Purchaser of Corporate Property from Stockholders With- out Provision for Creditors.....	18

AUTHORITIES CITED.

	Page
Barlow vs. N. P. R. R. (240 U. S., 484; L. Ed., 760)	3
Chicago vs. Third National Bank (134 U. S., 287)	11
Cook vs. Tullis (18 Wall.), 85 U. S., 332	11
Jamestown & N. R. R. R. Co. vs. Jones, 177 U. S., 125; 44 L. Ed., 698)	3
Kansas City Southern Ry. Co. vs. Guardian Trust Co., (240 U. S., 176)	11
Ketchum, <i>et al.</i> , vs. City of St. Louis (101 U. S., 306; 25 L. Ed., 199)	8
Louisville Trust Co. vs. Louisville, etc. (174 U. S., 674, 683-4)	11
Minneapolis, S. P. & S. Ste. M. R. R. Co. vs. Doughty, (52 L. Ed., 744)	3
Northern Pacific Ry. Co. vs. Boyd (228 U. S., 482) . . .	11
Rio Grande Western R. R. Co. vs. Thomas B. Stringham (239 U. S., 45-47; 60 L. Ed., 136)	3
Stalker vs. Oregon Short Line R. R. Co. (56 L. Ed., 1027)	3
St. Joseph & Denver City R. R. Co., <i>et al.</i> , vs. Mathew Baldwin (103 U. S., 426; 26 L. Ed., 579)	3

STATUTES.

16 Stat. L., 573	2, 4, 5, 10
24 Stat., 391	4, 15, 16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1917.

No. 92.

DAVID J. WALLER, JR., AND LEVI E. WALLER, TRUSTEES,
ETC., in their own behalf and in behalf of all other
Bondholders secured by Deed of Trust, etc., dated Sep-
tember 4, 1872, *Appellants*,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY, NEW OR-
LEANS PACIFIC RAILROAD COMPANY, ET AL.

ADDITIONAL BRIEF FOR APPELLANTS.

There are two important points in this case, to which it is respectfully submitted, a brief reference may appropriately be made in addition to what has already been stated in the brief for appellants. They are as follows:

First. The distinctly different status of the railroad, the right of way and the appurtenant property necessary for operating purposes, from that of the other property covered

by the trust given to secure the payment of appellants' bonds. This condition grows out of the grant, the terms of the trust, the provision for the disposition of the income, the transfer and the present ownership of the railroad including the right of way, etc.

Second. The right of the appellants to recover, as creditors, from the appellees, the admitted holders of the corporation property, irrespective of the Deed of Trust.

I.

AS TO THE FIRST PROPOSITION.

By Sections 8 and 22 of the Act of March 3, 1871 (16 Stat. L., 573), there was granted to the Baton Rouge Company a right of way 400 feet from New Orleans, Louisiana, to Marshall, Texas. There was also granted such adjacent land to said right of way, not exceeding 40 acres at any one point, as might be necessary for stations, buildings, workshops, yards, etc.

By Section 9, to aid in the construction of this railroad, there was granted every alternate section of land for ten miles on each side of the right of way.

Thus it is seen that two separate and distinct estates were granted by the Act to the Baton Rouge Company. First, a right of way, etc., for a railroad. Second, certain alternate sections of land to aid in the construction of the railroad. The grant of the first was entirely complete without the second, and was independent of it. The second estate, or alternate sections, will not be further considered here.

1.

GRANT OF RIGHT OF WAY ABSOLUTE, SUBJECT ONLY TO REVERTER FOR NON-USER.

It is contended by the appellants that the grant of the right of way to the Baton Rouge Company was absolute,

subject only to reverter for non-user. This contention is sustained by the decision of this court in the case of *St. Joseph and Denver City Railroad Company, et al., v. Mathew Baldwin* (103 U. S., 426; 26 L. Ed., 579). Wherein considering language identical in substance and almost identical in words this court said:

"But the grant of the right of way by the 6th section, contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purpose designed."

* * * * *

"We are of opinion, therefore, that all persons acquiring any portion of the public lands, after the passage of the act in question, took the same subject to the right of way conferred by it for the proposed road." (103 U. S., 430; 26 L. Ed., 579-80.)

Again this court said in *Rio Grande Western R. R. Co., v. Thomas B. Stringham* (239 U. S., 45-47; 60 L. Ed., 136):

"The right of way granted by this and similar acts is neither a mere easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter in the event that the company ceases to use or retain the land for the purposes for which it is granted and carries with it the incidents and remedies usually attending the fee."

The court here quotes numerous authorities in support of this principle:

See also *Barlow v. N. P. R. R.*, 240 U. S., 484; L. Ed., 760. *Jamestown & N. R. R. Co. v. Jones*, 177 U. S., 125; 44 L. Ed., 698. *Minneapolis, S. P. & S. Ste. M. R. Co. v. Doughty*, 52 L. Ed., 744. *Stalker v. Oregon Short Line R. Co.*, 56 L. Ed., 1027.

GRANT NOT FORFEITED BY ACT OF FEBRUARY 8, 1887.

It is difficult to understand how appellee's contention could be seriously made, that the Act of February 8, 1887 (24 Stat., 391), had cut off and extinguished whatever title may have been vested in the Baton Rouge Company by the grant of 1871. This contention certainly is not justified by the language of the Act of 1887, nor was it so understood by the parties in interest at the time, and especially by the representatives of the appellee. E. J. Ellis, attorney for the New Orleans Pacific Company in a communication dated April 18, 1887, addressed to the Secretary of Interior wherein he asked that patents be issued for the alternate sections of land said:

"It would seem that this is manifestly just and proper, since the Act of 1887 appears to be, not a new or original grant, but a confirmation by Congress of the assignment of the grant from the original grantee of the New Orleans Pacific Company." (R., 164.)

Furthermore, the Dillon and Alexandria mortgages of April, 1883, and January, 1884, covered this same land, which was referred to in these mortgages in the following language:

"all and singular the said several sections of land and each and every part thereof, granted as aforesaid to the said New Orleans, Baton Rouge & Vicksburg Railroad Company by the said Act of Congress, approved March 3, 1871." (R., 264, 294.)

It is admitted in appellee's answer that it came into possession of this right of way and road bed through the New Orleans Pacific Company (R., 45, 46).

It further appears that this right of way, road bed, etc., was not embraced in nor covered by the decree entered, on the 16th day of November, 1891, in the Dillon and Alexan-

der suit, wherein it was attempted to hold that the mortgage or deed of trust of September 4, 1872, given to secure the payment of appellants' bonds was not binding as to the alternate sections of land. The lands covered by that decree applied to the alternate sections only, or to the lands granted by the 22d section of the Act of March, 1871 (R., 307, 310).

Thus it is seen that this right of way and road bed covered by the deed of trust to secure the payment of appellants' bonds, was held by the mortgagor under an absolute grant, subject to reverter for non-user, made prior to the date of the deed of trust; that it came, through manipulation of stock, directly from the mortgagor to the appellee, who admits the possession and control of the property since 1881.

CONDITIONS UNDER WHICH APPELLEE HOLDS THE PROPERTY MAKE IT LEGALLY LIABLE.

Having traced the property to the appellees the questions to be considered are: First, What are the conditions under which appellee holds this property? Second, What is the legal effect of this ownership of the property, so acquired, upon appellee's liability to appellant and as affecting the application of the doctrine of laches in the enforcement of that liability?

IT IS RESPECTFULLY CONTENDED THAT THE INSTRUMENT OF TRUST, GIVEN TO SECURE THE PAYMENT OF APPELLANTS' BONDS SO IMPRESSED THIS PROPERTY WITH A TRUST AS TO MAKE ALL WHO COME INTO ITS POSSESSION, WITH KNOWLEDGE OF THAT TRUST, TRUSTEES UNDER, AN EXPRESS TRUST.

Considering this instrument we find that it contains very explicit language, creating an express trust. It is important

to note that this trust embraces not only the alternate sections of land, but that it covers in language which can not be misunderstood, *the right of way or road bed, etc., together with the income, tolls, rents and profits arising therefrom.*

PROVISIONS OF DEED OF TRUST BINDING UPON SUCCESSORS
AND ASSIGNS OF BATON ROUGE COMPANY.

In order that there may be no misunderstanding and to make the trust upon this property as complete and effective as possible; it is made binding upon the *successors and assigns* of the Baton Rouge Company in unmistakable language. In describing the property the following language is used in the deed of trust

"Including all the railroads, ways, rights of ways, depot grounds and other lands, all tracks, road-bed, rails, * * * And all real and personal property held or acquired, or thereafter to be held or acquired, by the said railroad company, its *successors or assigns*, for use in connection with the above-described railroads of the said railroad company." (R., 63.)

"and all the property, corporate franchise, rights and privileges of whatsoever name or nature now held by, or granted by, or hereafter to be acquired by or granted to the said railroad company, or its *successors or assigns*, together with all and singular the tenements, hereditaments, * * * tolls, incomes, revenues, rents, issues and profits thereof; and also the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said railroad company, or its *successors or assigns*, of, in and to the same, * * * and also, all the rights, title, interest, claim, estate or demand whatsoever which said railroad company or its *successors* now has, or may at any time hereafter acquire, or become in any way en-

titled to, of, in, and to all the lands and sections of lands situate, lying and being on either side of the said railroad. * * * And also, all the right of ways granted by the State of Louisiana, or by the United States, together with all and singular the tenements, hereditaments, rights, privileges, easements, income, advantages and appurtenances to the said lands and premises belonging." (R. 64.) (*Italics ours.*)

"Until default shall be made by the said railroad company, its *successors or assigns*, in the payment of the principal or interest, or some part thereof, of the said bonds, or someone of them, or until default shall be made in some payment into the sinking fund hereinafter mentioned, or in some other requirement hereof, the said railroad company, its *successors and assigns*, shall be suffered and permitted to possess, manage, operate and enjoy the said railroad, * * * Property and franchise hereinbefore described; and to receive, take and use the tolls, incomes, revenues, rents, issues and profits thereof, in the same manner and with the same effect as if this mortgage had not been made." (R. 65.) (*Italics ours.*)

The bonds contain the following provision:

"This bond is entitled to the benefit and security of a sinking fund, * * * to be set apart for the redemption of the bonds secured by said act of hypothecation or mortgage, whereby the proceeds of all lands granted to the said railroad company, are to be applied to the payment of interest on said bonds, and to the redemption of the said bonds, and whereby also one per centum of the gross earnings of the said railroad company are, after the first day of June, one thousand eight hundred and seventy-nine, to be also applied to the redemption of the said bonds, as in said act of hypothecation and mortgage is more fully set forth and described." (R. 60.)

Having shown the conditions under which the property was acquired and is held, the question naturally arises, did the appellee, *the successor and assign*, of the mortgagor, assume the obligations of the trust, and become an Express Trustee by acquiring the property. We think this question is affirmatively settled by this court in the case of *George E. Ketchum, et al., v. City of St. Louis* (101 U. S., 306; 25 L. Ed., 199).

In that case the question of a trust having been impressed upon the property, which created a liability upon all parties subsequently taking the property, and the effect of a mortgage upon the property, binding subsequent holders to the performance of the terms of the mortgage, are discussed and a number of authorities cited in support of the Court's affirmative holding. The following is taken from the syllabus:

"4. Where a debtor, by a concluded agreement with a creditor, sets apart a fixed portion of a specific fund in the hands, or to come into the hands, of another from a designated source and directs such person to pay it to the creditors which he assents to do, this is an appropriation binding upon the parties and upon all persons with notice who subsequently claim an interest in the fund under the debtor.

"5. A party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons who are either volunteers or who take the estate on which the lien is agreed to be given with notice of the stipulation. Such agreement raises a trust which binds the estate to which it relates and all who take title thereto with notice of such trust can be compelled in equity to fulfill it."

See also appellants' principal brief, pages 70-78.

It is not denied that the mortgagor, "*its successors and assigns,*" were entitled to the income, rents and profits from the railroad and appurtenant property, and the income from the sale of the alternate sections of land, *only so long as the interest on the bonds was paid and the one per cent annual gross income from the railroad was paid into the sinking fund, and the bonds paid at maturity*; that the appellee is such successor, and is now, and for many years has been in possession and control of the railroad and in the enjoyment of its income, including the one per cent; that it has been receiving patents to the alternate sections of land right along, even since these proceedings were instituted; that this is an express trust, in an instrument under seal, and that the limitation on such instruments is twenty years in New York. That laches can not be invoked for a shorter period than that of the limitation, especially when there has been no change in the status of the parties, and that the obligations by this trust were imposed upon the appellee, the purchaser of this property seems to be too well established by this Court to be questioned.

Having acquired, under the conditions disclosed by this record, this property, impressed with such obligations as are contained in this deed of trust, it is difficult to understand how appellee can hope that this court will seriously consider the defenses of, limitation or laches, which seem to be appellee's principal reliance. From a reading of the record and their opinions it is evident that the lower court could not have had these principles and these facts clearly presented, and in mind, at the hearing.

That the right of way was of very great value to the appellee, is unmistakably disclosed by the record in this case. The facts shown in the record, make the hearsay testimony of appellee's witness, Abrahams (R., 315), to the

effect that there were deeds in appellee's office for all the right of way, except twelve or fifteen miles, of very little importance. This court having held that the title under the grant to the right of way related back to the time of the grant in 1871, there could be but little reason for getting deeds to the right of way except quit claim deeds to save the expense of ejectment proceedings.

Furthermore it is absurd to contend that there were only twelve or fifteen miles of the right of way covered by the grant when the undisputed record shows that appellee received more than a million acres of land from the alternate sections along the line of the road.

II.

THE RIGHT OF THE APPELLANTS TO RECOVER, AS CREDITORS, FROM THE APPELLEE, THE ADMITTED HOLDER OF THE CORPORATION PROPERTY, IRRESPECTIVE OF THE DEED OF TRUST.

Excepting the plea of laches, the entire defense set up, goes to the validity of the deed of trust by the Baton Rouge Company, conveying the alternate sections and right of way to the Union Trust Company, as Trustee, to secure these bonds.

If these defenses were well taken, appellants would stand before this Court as unsecured creditors of the Baton Rouge Company and their rights would rest on the following elementary principles, announced and enforced by this Court in recent cases.

The property of a corporation is a trust fund charged primarily with the payment of all corporate liabilities. Any device, whether by private contract, or by judicial sale, whereby stockholders are preferred over creditors, is void as against creditors, regardless of the motive

with which it is made. The property being so bound for the debts, the purchaser thereof from stockholders, becomes likewise bound. No proceeding can be rightfully carried to consummation, which recognizes and preserves any interests for the stockholders without also recognizing and preserving the interests of every creditor of the corporation. Whether purposely or unintentionally any creditor is not provided for, he can assert his superior rights in the property transferred, against the purchaser. Any arrangement of parties by which the subordinate rights and interests of stockholders is attempted to be secured at the expense of the prior rights of any class of creditors, comes within judicial denunciation.

Kansas City Southern Ry. Co. vs. Guardian Trust Co., 240 U. S., 176.

Northern Pac. Ry. Co. vs. Boyd, 228 U. S., 482.

Louisville Trust Co. vs. Louisville, etc., 174 U. S., 674, 683-4.

So long as the trust property can be traced, if it has been converted, the property into which it has been converted remains subject to the trust, and a court of equity acting on behalf of creditors will follow the funds so diverted.

Chicago, etc., vs. Third National Bank, 134 U. S., 287.

Cook vs. Tullis (18 Wall.), 85 U. S., 332.

As this Court put it in the Boyd case above cited, "Being liable for this diversion, * * * the Northern Pacific Railroad Company remained so liable, *until the funds were restored to the true owner.* (P. 500.) (Italics ours.)

And in the Kansas City Southern Ry. case above cited the Court says, in regard to the contention that there was nothing left for creditors after payment of the bonds, "there was an equity" for which this defendant must account, which fully meets the claim in this case that the Baton Rouge Company had only an interest called a *float*, or as called in appellees' brief herein, "*an assignable chose in action*" "a mere chose in action."

IT HAD THE UNQUESTIONED TITLE TO THE RIGHT OF WAY.

Now applying these principles to the facts disclosed in this record, we find:

First. That the President of the Baton Rouge Company under resolution of the Directors, by deed of date January 5, 1881, transferred and conveyed to the New Orleans Company "all the right, title and interest" of the Baton Rouge Company in the land grant from Congress, and that no provision whatever was made to secure the creditors, and that this land grant was all of the property of the Baton Rouge Company, and by its transfer, that company was left insolvent.

Second. That this transfer was ratified by the stockholders at a meeting at which Mr. Wheelock presided, and one Thos. F. Maher, was Secretary. Wheelock was the President of the New Orleans Company (R., pp. 93-96). These two were the only persons present, Wheelock voted as proxy 42,775 shares, the total capital stock of the Baton Rouge Company being 50,000 shares, and Thos. F. Maher voted *none*. The sale and transfer by the President of the Baton Rouge Company was, of course, void without this ratification by the stockholders. It is therefore a sale *by the stockholders*. The fact that Wheelock purports to vote as proxy, does not alter the fact, that it was a sale by stockholders.

In his statement to Congress (R., p. 178) Wheelock says: "I at once took steps to secure the transfer of the land grant and succeeded." On R., p. 161, in a letter to the Secretary of the Interior, he says: "In 1880, the New Orleans Pacific Railway Company * * * *bought* from said Backbone Company its title," etc.

The transfer of the land grant was to the New Orleans Pacific Company of which Wheelock was President. The transaction was therefore a "transfer *by* stockholders *from* themselves, *to* themselves," a transaction which this Court has said "can not defeat the claims of a creditor" (Boyd Case) p. 11, *supra*.

Under these elementary principles, therefore, the New Orleans Pacific Company by the purchase of this land grant, from the stockholders of the Baton Rouge Company became directly and primarily liable to the creditors of the Baton Rouge Company for their claims.

Third. We find that just five and a half months after this transfer from the Baton Rouge Company of this land grant, the New Orleans Company is consolidated with appellee under the name of the latter, and all the shares of the New Orleans Company delivered up to the Texas and Pacific Company in exchange for an equal number of shares of the latter company. By this consolidation all of the property of the New Orleans Company passed to appellee and all the stockholders of the New Orleans Company became stockholders to an equal extent of appellee.

We trace, then, the stockholders of the Baton Rouge Company into the New Orleans Pacific Company and then the stockholders of the New Orleans Company into the appellee, and we trace the land grant and right of way belonging to the Baton Rouge Company into the possession of appellee.

This brings this case directly within the principles above stated, and makes appellee primarily liable to appellants for these bonds.

IT IS IN VAIN THAT APPELLEE ARGUES THAT THE BATON ROUGE COMPANY DID NOT EARN THIS LAND GRANT BUT THAT IT WAS EARNED BY THE NEW ORLEANS COMPANY.

The record shows that the President of the New Orleans Company made vigorous efforts during the years 1876 to 1880 to secure a forfeiture of this land grant by Congress in order to get it away from the Baton Rouge Company and secure it for the New Orleans Company and that he failed. He was then advised that the Baton Rouge Company had a good and valid title, subject to the power of Congress to forfeit same, if the road was not built, but that if the New Orleans Company purchased this title from the Baton Rouge Company and built the road, its title would be complete. This is what the New Orleans Company did. No matter therefore what was the character of title held by the Baton Rouge Company, it was of sufficient value for the New Orleans Company to secure, and thereby at once place itself in position to procure the building of its line of road from Shreveport to Baton Rouge, through a consolidation with appellee. Its President, Wheelock, in his statement to Congress (R., p. 178), says: "Such was the embarrassed condition of the finances of the people of Louisiana, that the company, was left helpless and unable to prosecute its work. * * * At this juncture, the parties who were constructing the Texas and Pacific Railroad entered into writings to extend that line and construct the New Orleans Pacific Railway to New Or-

leans, provided the land grant of the New Orleans, Baton Rouge and Vicksburg Railroad Company was secured to them. I at once took steps to secure the transfer of the land grant, *and succeeded*. Contracts for the construction of the road were then immediately signed, and it was rapidly pushed forward, and was completed in 1882."

General Dodge says this contract was made July 31, 1880 (R., p. 126), and that "we would not undertake the construction of this road unless it could get the benefit of the land grant which had been made to the Backbone Company either by a transfer of same by Congress or by the Backbone Company. * * * I here positively state that unless this land grant could have been assured to the New Orleans Pacific we would not have enlisted in the enterprise of building the road. * * * The land grant constituted part of the consideration for the building of the New Orleans Pacific Railroad" (R., pp. 173, 4).

To use the words of Justice Holmes, in *Kansas City Southern vs. Guardian Trust Co.*, "there was an equity" for which this defendant must account.

It is therefore not in the power of appellee to say the title of the Baton Rouge Company to this land grant was of *no value*. It was of sufficient value to secure the buliding of the railroad.

ACT OF FEBRUARY 8, 1887, NO DEFENSE TO RECOVERY OF
CREDITORS OF BATON ROUGE COMPANY.

And so it is with the claim, that the Act of Congress of February 8, 1887 (24 Stat., 371), granted this land direct to the New Orleans Pacific Company and forfeited all the claim of the Baton Rouge Company. No matter what construction may be placed on this act, it is clear Congress could

not have at that late date passed any act which would or could affect the interest of the Baton Rouge Company's creditors, for the reason that the road was completed from Shreveport to Baton Rouge by November, 1882 (R., p. 161), and was accepted and approved by the Government and patents issued to the extent of 670,000 acres, in March, 1885.

That no such purpose was in the view of this act of Congress is beyond controversy. Persistent effort had been made to secure the forfeiture of this land grant by Congress during the years 1876 to 1880, when it was in the power of Congress to have done so, and all these efforts had signally failed, for reasons satisfactory to Congress. It was not therefore at all likely that Congress would undertake to forfeit these lands in 1887 after the road was built and accepted by the Government and patents issued for 670,000 acres of the lands.

This could, however, in no way affect the rights of the creditors of the Baton Rouge Company, which had become fixed in 1881, by the sale and transfer of this grant by the stockholders of the Baton Rouge Company, without providing for the creditors. The New Orleans Company assumed all responsibility as to building the road and complying with the proviso in the act of Congress, and by this purchase of this land grant rendered it impossible for the Baton Rouge Company ever to do so.

This act of 1887 is therefore no defense to the recovery by these appellants, as creditors of the Baton Rouge Company.

It is apparent therefore that if all these defenses set up by appellee are admitted, they would not constitute any bar to a recovery by appellants as unsecured creditors, under the principles herein relied upon.

Appellee seeks to avoid this liability, by preserving the name of the New Orleans Company and leaving the alternate sections of the land grant in its name, while it takes over the right of way "and lands necessary and needful for railway purposes," and shall "own and control all the properties that the party of the first part (New Orleans Co.) now owns or by its charter and by-laws it has the right to exercise, own or control" (R., 51).

This Court, looking through such shams, to the substance of the transactions, find appellee in full possession and enjoyment of a line of railway from Shreveport to Baton Rouge, some 260 miles in length, which was constructed out of the proceeds of this land grant and built on the right of way included in said grant to the Baton Rouge Company (R., 126-7, 130, 149, 160-1, 173).

It finds that through the name of this New Orleans Pacific Company appellee has received more than one million acres of land from the United States, under this grant to the Baton Rouge Company and is still receiving lands thereunder, running through the very heart of Louisiana.

Appellee is, therefore, the real party liable for the payment of the claims of appellants, and the New Orleans Pacific Company is but a shadow, behind which it seeks to hide. The various defences set up to show that the trust deed given to secure these bonds is void, are therefore of no avail, even if they were well taken.

These bondholders come before this Court as *bona fide* creditors of the Baton Rouge Company and show that the stockholders of that company sold and transferred all the property of the company to the New Orleans Company, leaving the company insolvent and without any provision for the protection of its creditors, and that the New Orleans Company by the exchange by its stockholders of their shares for an equal number of shares of appellee has been con-

solidated with appellee, who is now in possession of this property and its proceeds.

These undisputed facts render appellee primarily liable to appellants, under the principles established by this court, without regard to whether the trust deed given to secure these bonds is valid or not.

LACHES NOT AVAILABLE TO PURCHASER OF CORPORATE
PROPERTY FROM STOCKHOLDERS WITHOUT PROVISION
FOR CREDITORS.

There remains therefore only the plea of laches set up by appellee, for consideration, in this connection. This defense has been so fully presented in the brief already filed, and above in this brief, it is proper here to consider only its application to the point discussed here.

The principle, that the purchaser of the property of a corporation, from the stockholders without provision for the protection of its creditors, becomes bound for the debts, rests on the ground that the court regards the transaction a fraud on creditors, whether so intended or no.

Where a transaction is held a fraud on creditors, the court will not for a moment listen to a plea of laches from the person guilty of the fraud.

Time never ratifies a fraud, either a fraud in fact or a fraud in law. So long as the party perpetrating the fraud is in the enjoyment and possession of the *fruits of the fraud*, he will not be heard to ask for protection on the ground of laches. When one asks relief in equity he must come with clean hands. He who asks equity must be ready to do equity. *Time* never ripens the claims of a wrong-doer, in the eyes of a court of equity.

Until there has been some change in parties or in the situation, which would render the enforcement of the claims,

unjust or inequitable, a court of equity will not apply the doctrine of laches.

In Northern Pacific Company vs. Boyd, this Court lays down the rule, that the purchaser of corporate property from the stockholders without provision for the creditors, "being liable for the diversion," *remains so liable until the property is restored to the true owner.*

In this case we have the *same parties*, and the same property or the proceeds of it, and the appellee shows no change of conditions, such as to render it unjust to require it to pay these bonds out of the proceeds of the property which was first bound to the creditors, *prior* to the stockholders.

If appellants are therefore in the position of *unsecured creditors*, then under the principles we have herein cited, the purchase of this property *from the stockholders* by the New Orleans Company rendered that company primarily liable for the bonds, and its consolidation with appellee by the exchange of its shares of stock renders appellee primarily liable for these bonds. Not one of the defenses set up herein is a bar to appellants' right to a decree for their bonds as *unsecured creditors*.

Respectfully submitted,

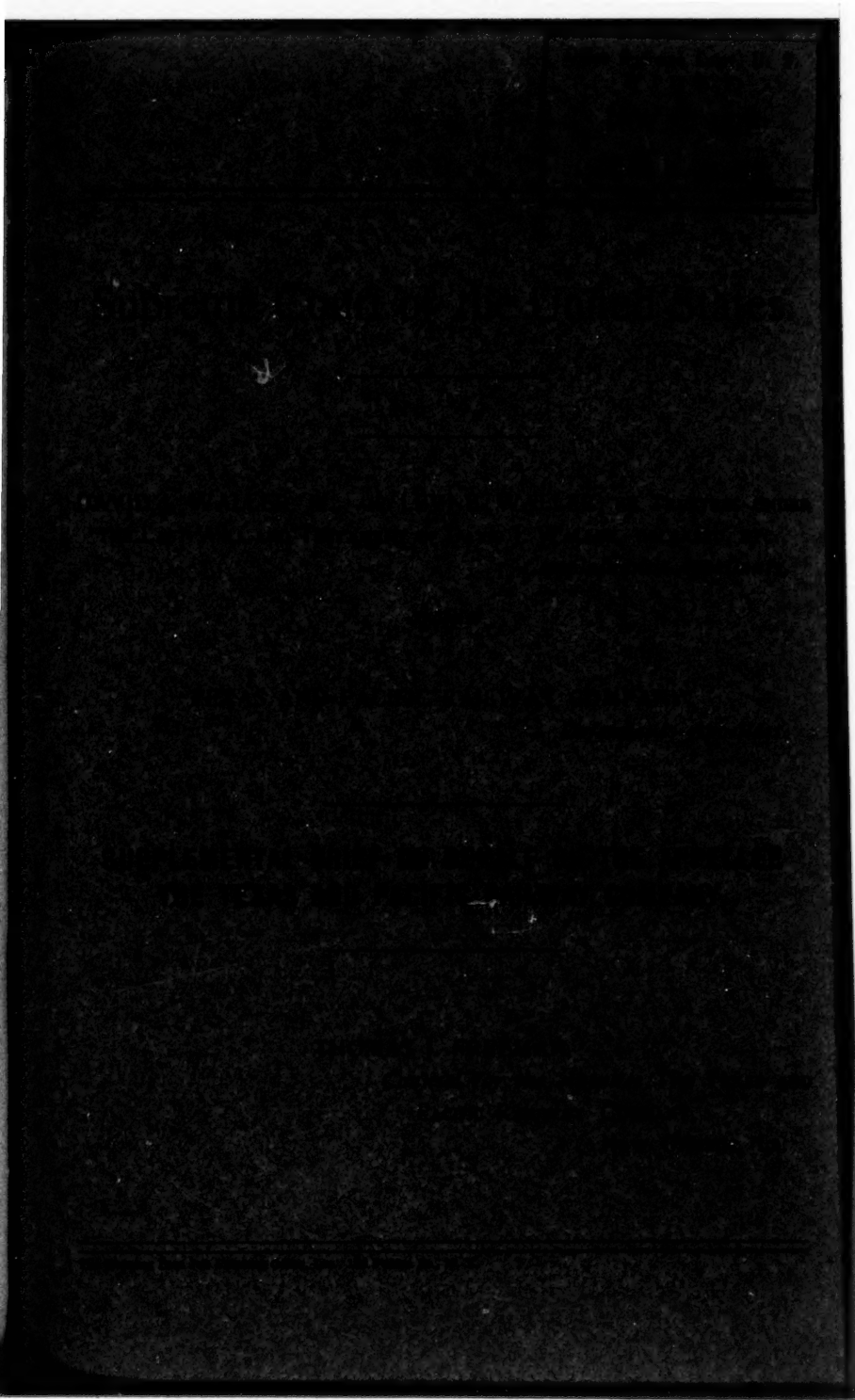
WILLIAM A. MILLIKEN,

C. C. CALHOUN,

DANIEL B. HENDERSON,

Counsel for Appellants, other Bondholders.





Supreme Court of the United States.

DAVID J. WALLER, JR., and LEVI E. WALLER, as Trustees Under the Last Will and Testament of David J. Waller, Deceased, in Their Own Behalf and on Behalf of All Other Bondholders Secured by Deed of Trust Made by New Orleans, Baton Rouge and Vicksburg Railroad Company, Dated the 4th Day of September, 1872,

Complainants-Appellants,

AGAINST

TEXAS AND PACIFIC RAILWAY COMPANY, NEW ORLEANS, PACIFIC RAILROAD COMPANY and the UNION TRUST COMPANY OF NEW YORK,

Defendants-Appellees.

No. 92.

Now comes the appellee herein, The Texas and Pacific Railway Company, and respectfully presents to the Court this, its supplemental, or additional, brief herein, and submits the following additional propositions of law:

Where the Circuit Court and the Circuit Court of Appeals considers the same evidence, and the two Courts agree in the

findings, in such a case in equity the findings will not be disturbed by the Supreme Court of the United States, unless they are shown to be clearly erroneous.

Authorities:

Dun vs. Lumbermen's Credit Association, 209 U. S., page 20; bottom of page 23, and top of page 24.

Towson vs. Moore, 173 U. S., page 17.

Brainard vs. Buck, 184 U. S., page 99.

Shappirio vs. Goldberg, 192 U. S., page 232.

The Texas & Pacific Railway Company vs. Railroad Commission of Louisiana, 232 U. S., page 339.

Chicago Junction Railway Company vs. King, 222 U. S., pages 222-224.

Statement.

Both the Circuit Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit, after considering the same evidence, agreed in their findings that the complainant herein was not entitled to maintain their cause of action for the reason that they had slept upon their rights too long and had been guilty of laches and unreasonable delay in prosecuting their cause of action.

United States District Judge Walter Evans dismissed complainant's cause of action on the ground that plaintiff could not maintain his cause of action on account of laches, and the Circuit Court of Appeals for the Second Circuit upon the same identical evidence affirmed the decree handed down by Judge Evans.

An examination of the record clearly establishes the fact that the judgment both of the United States

District Court for the Southern District of New York and of the Circuit Court of Appeals was correct, and is supported in every way by the evidence in this case.

Certainly the record does not show that the two Courts were clearly erroneous; on the contrary, the record conclusively establishes the fact that their judgments were correct and amply supported by all the evidence in the case. As was said by Judge Cox of the Circuit Court of Appeals:

“ The proposition is somewhat startling that the holder of the obligations of one corporation, secured by mortgage on its property, may maintain a suit forty years after the date of said obligation, and based thereon, against another corporation *not a party thereto.*” (Italics are ours.)

We respectfully submit that this bill should be dismissed.

THOMAS J. FREEMAN,
Counsel for
THE TEXAS & PACIFIC RAILWAY CO.,
Appellee.

SUPREME COURT OF THE UNITED STATES

— 1914 —

DAVID J. WALSH, PLAINTIFF,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY, DEFENDANT.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Defendant in Error.

BRIEF ON BEHALF OF THE APPEALER THE TEXAS
AND PACIFIC RAILWAY COMPANY.

THOMAS J. WALSH,
Counsel for the Plaintiff, The Texas and
Pacific Railway Company,
New Orleans, La.

SUBJECT INDEX.

	PAGE
STATEMENT.....	1-21
POINT I.....	22-31
POINT II.....	31-34
POINT III.....	34-38
POINT IV.....	38-42
POINT V. CONCLUSION.....	42-60

CASES CITED.

Badger <i>vs.</i> Badger, 2 Wallace 87.....	23, 24
Beals <i>vs.</i> Illinois, Missouri & Texas Railway Co., 133 U. S. 290.....	36
Brown <i>vs.</i> County of Buena Vista, 95 U. S. 157.....	27
Buttz <i>vs.</i> Northern Pacific Railway Company, 119 U. S. 55.....	39
Coddington <i>vs.</i> Railroad Company, 103 U. S. 409.....	23
Foster <i>vs.</i> Mansfield, Coldwater & Lake Michigan Railroad Company, 146 U. S. 88.....	27
Gallihier <i>vs.</i> Cadwell, 145 U. S. 368.....	27
Harpending <i>vs.</i> The Dutch Church, 16 Peters 455.....	23
Jenkins <i>vs.</i> Pye, 12 Peters 251.....	27
Kansas Pacific Railway Company <i>vs.</i> Dun- meyer, 113 U. S. 629.....	39
Kerrison <i>vs.</i> Stewart, 93 U. S. 155.....	36

	PAGE
Marsh <i>vs.</i> Whitmore, 21 Wallace 178.....	27
Metropolitan Bank <i>vs.</i> St. Louis Despatch Co., 143 U. S. 436.....	23
Missouri, Kansas & Texas Railway Company <i>vs.</i> Kansas Pacific Company, 97 U. S. 491.	39
New Orleans Pacific Railway Co. <i>vs.</i> Parker, 143 U. S. 42.....	4, 6, 9, 40, 42
New Orleans Pacific Railway Co. <i>vs.</i> Parker, 143 U. S. 57.....	13
New Orleans Pacific Railway Co. <i>vs.</i> Union Trust Co., 41 Fed. Rep. 717.....	6, 40
O'Brien <i>vs.</i> Wheelock, 184 U. S. 450-493....	27
Patterson <i>vs.</i> Hewitt, 195 U. S. 309-317....	27
Raphael <i>vs.</i> Wasatach & Jordan Valley Rail- way Co., 201 Fed. 854.....	36
Richter <i>vs.</i> Jerome, 123 U. S. 233.....	36
St. Joseph and Denver City Railroad Co. <i>v.</i> Baldwin, 103 U. S. 426.....	42
Shaw <i>vs.</i> Little Rock & Fort Smith Railroad Co., 100 U. S. 605.....	36
Speidel <i>vs.</i> Henrici, 120 U. S. 377.....	27
Story's Equity Jurisprudence, Sec. 1520-A...	27
United States <i>vs.</i> Allsbury, 4 Wallace 186...	35
United States <i>vs.</i> New Orleans Pacific Rail- way Company, 124 U. S. 24.....	40
United States <i>vs.</i> Southern Pacific Company, 146 U. S. 570-599.....	39
Van Wyck <i>vs.</i> Knevals, 106 U. S. 360.....	39

STATUTES.

Acts of Louisiana of 1870, page 7, Act 43.....	5
Act of Congress March 3, 1871, 16 Stat. at Large, 573.....	6
Secs. 381, 382, 383-387, 388, 390a, New York Code Civil Procedure.....	25
Art. 3544, Merrick's Louisiana Code.....	26
Laws of Louisiana 1869.....	43
Act of Congress, March 3, 1871, Chap. 122, 16 Stat. at Large.....	43

Supreme Court of the United States.

DAVID J. WALLER, JR., and LEVI E. WALLER, as Trustees under the Last Will and Testament of David J. Waller, deceased, in their own behalf and on behalf of all other bondholders secured by Deed of Trust made by New Orleans, Baton Rouge and Vicksburg Railroad Company, dated the 4th day of September, 1872,

Complainants-Appellants,

AGAINST

THE TEXAS AND PACIFIC RAILWAY COMPANY, NEW ORLEANS PACIFIC RAILROAD COMPANY and the UNION TRUST COMPANY OF NEW YORK,
Defendants-Appellees.

No. 363.

BRIEF ON BEHALF OF THE APPEL- LEE THE TEXAS AND PACIFIC RAILWAY COMPANY.

Statement.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Second Circuit, affirming a decree of the District Court of the United States for the Southern District of New

York, dismissing on the ground of limitations and laches a suit in equity brought by the appellants for the purpose of holding the defendant, The Texas and Pacific Railway Company, liable for the payment of thirty bonds of \$1,000. each, with accrued interest, issued by the New Orleans, Baton Rouge and Vicksburg Railroad Company in September, 1872, and due and payable September 1, 1902, and secured by Deed of Trust by the said Baton Rouge Railroad Company to the Union Trust Company of New York, as Trustee, on all of the property of the said Baton Rouge Railroad, including certain Land Grants given it by Congress (see Opinion of District Judge Evans, Record, p. 336), which facts are approved in the opinion of Judge Coxe of the United States Circuit Court of Appeals (see Record, p. 347).

This suit as originally brought, made the Union Trust Company of New York as Trustee, a party defendant and the New Orleans Pacific Railroad Company a party defendant. Before final hearing in the United States District Court of The Southern District of New York, the bill was dismissed as to the Union Trust Company of New York, and no subpœna has ever been issued, served or returned as to the New Orleans Pacific Railroad Company so that the New Orleans Pacific Railroad Company has never been made a party to the record, nor does the decree undertake to adjudicate any of its rights in the premises, so that the sole defendant in the Court below was the The Texas and Pacific Railway (see Printed Record, p. 54).

At the outset, by reason of the important bearing which the point has upon the defense of limitations and laches, it is respectfully urged that the

record does not contain the necessary proof that the Baton Rouge bonds were ever lawfully issued so as to become the binding obligations of the Baton Rouge Company. The only evidence offered in that behalf was the following:

FIRST. That a mortgage or deed of trust purporting to have been executed by the Baton Rouge Company to the Union Trust Company of New York, as Trustee, dated September 4, 1872, and providing for an issue of land grant bonds, was placed upon record in certain parishes in the State of Louisiana, and in the Department of the Interior (Record, pp. 80, 81).

SECOND: That the Trustee's certificate affixed to each of the alleged obligations described in the Bill of Complaint as bonds of the Baton Rouge Company, bore the genuine signature of Mr. Frothingham, who in 1872 was President of the Union Trust Company of New York, Trustee of the alleged mortgage, and that the records of the Union Trust Company indicated that bonds in the amount of \$1,275,000 had been certified by the Trustee (Record, pp. 56-57).

It is, of course, unnecessary to point out to this Court that the bonds are issued by the obligor and not by the mortgage trustee, and that the Trustee's certificate affixed to the alleged Baton Rouge bonds serves merely to identify the same as belonging to the series entitled to the benefit of the mortgage security *if and when* validly issued and put in circulation by the Baton Rouge Company.

While it is known that certain alleged Baton Rouge bonds were at one time in the hands of persons claiming to be owners of the same, it is certainly very doubtful whether any bonds were

ever lawfully put into circulation. In this connection, it may be noted that as late as 1891 Mr. Justice BROWN in his opinion in the case of *New Orleans Pacific Railway Company vs. Parker*, 143 U. S. 42, speaking with respect to this particular security, says (p. 44) :

“* * * on September 4, 1872, one Allen, assuming to act as President of the Baton Rouge Company, also executed a mortgage to secure the payment of 12,000 bonds, *which, however, appears never to have been issued.*” (Our italics.)

It is therefore not unreasonable for the Texas and Pacific Railway Company to insist that the issue of these alleged Baton Rouge bonds must be established by strict legal proof.

Mr. Levi E. Waller, one of the appellants, testified that the Baton Rouge bonds described in the complaint were found among his father's effects at the time of his death in 1893, and that he *thought* that his father had owned them about seven or eight years (Record, p. 56).

How the elder Waller came into possession of the alleged bonds is not disclosed. Such knowledge as the elder Waller may have had as to the manner in which the alleged bonds were put in circulation has been lost by his death. Why the elder Waller failed for over a period of eight years to attempt to enforce the alleged bonds must therefore be left to conjecture.

There being no evidence that the issue of a single Baton Rouge bond was ever authorized by the Baton Rouge Company, no evidence that a single Baton Rouge bond was ever signed by an officer of the Baton Rouge Company, no evidence that a single Baton Rouge bond was ever sold, pledged or other-

wise disposed of or put in circulation by any person having actual or apparent authority to represent the Baton Rouge Company, it is submitted that the decree may properly be affirmed without reference to any of the questions presented in the appellant's brief, all of which presupposes that the alleged bonds described in the complaint are outstanding, valid and binding obligations of the Baton Rouge Company.

In order, however, that the Court may fully understand appellants' alleged cause of action and in order that the position of The Texas and Pacific Railway Company may be presented in its full strength, it seems desirable to state as briefly as possible

The History of the Baton Rouge Land Grant.

Although the facts are stated in some detail in the opinion of District Judge EVANS, see Record 336 a further statement, arranging the facts in chronological order, may be helpful.

The Baton Rouge Company was incorporated by Special Act of the General Assembly of Louisiana effective December 30, 1869, with authority to construct a railroad between New Orleans and Shreveport in the State of Louisiana (Acts of 1870; p. 7, Act 43; record, p. 206).

On October 1, 1870, the Baton Rouge Company executed a mortgage to the Union Trust Company of New York, as Trustee, to secure an issue of bonds to an authorized amount of \$6,250,000. Certain of these bonds got into circulation, were de-

faulted and were in litigation in the cases, among others, of *New Orleans Pacific Railway Company vs. Union Trust Company*, 41 Fed. Rep., 717, and *New Orleans Pacific Railway Company vs. Parker*, 143 U. S. 42. These cases may be consulted for further historical details with reference to the land grant.

On March 3, 1871, the Act of Congress approved March 3, 1871, incorporating the Texas Pacific Railroad Company became effective (16 Stat. at Large, p. 573). Section 22 of this Act provides

"That the New Orleans, Baton Rouge and Vicksburg Railroad Company chartered by the State of Louisiana, shall have the right to connect by the most eligible route to be selected by said Company, with the said Texas Pacific Railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by way of Alexandria in said State, to connect with said Texas Pacific Railroad Company at its eastern terminus, there is hereby granted to said Company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this Act granted in the State of California, to said Texas Pacific Railroad Company; and said lands shall be withdrawn from market, selected, and patents issued therefor and opened for settlement and preemption upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railroad Company within State of California; provided that said Company shall complete the whole of said road within five years from the passage of this act."

By Section 9, the grant of California lands to the Texas Pacific Railroad Company, to which reference is made in Section 22, is of

“* * * ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed.”

By Section 12, it is further provided that

“Said Company, within two years after the passage of this Act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the territories and twenty miles within the State of California, to be withdrawn from pre-emption, private entry and sale.”

On November 11, 1871, the Baton Rouge Company, pursuant to the provisions of Section 12 above mentioned, filed with the Department of the Interior, a map designating the general route of its proposed road from Baton Rouge to Shreveport (Record, p. 144). This was followed by an order of the Land Commissioner dated November 28, 1871, withdrawing from pre-emption, private entry or sale, odd numbered sections of land within thirty mile limits of the proposed road (Record, p. 83).

It may be observed, however, at this point that

the map so filed by the Baton Rouge Company was not a map of definite location, and that the filing of the map conferred upon the Baton Rouge Company no rights whatever with respect to the lands affected by the Commissioner's order.

This proposition will be developed in the course of the argument.

On September 4, 1872, the Baton Rouge Company acting by Calvin H. Allen, claiming to be its President, executed to the Union Trust Company of New York, as Trustee, the mortgage involved in the present suit, which mortgage provides for an issue of bonds to an authorized amount of \$12,000,000 and purports to cover all of the property of the Baton Rouge Company, including (Record, p. 64),

"all the right, title, interest, claim, estate and demand whatsoever which the said Railroad Company or its successors now has or may at any time hereafter acquire, or become in any way entitled to, of, in and to all the lands and sections of lands situate, lying and being on either side of the said railroad as the same may be finally located and constructed, in accordance with and as granted by the Act of Congress entitled 'An Act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road and for other purposes,' approved March 3, 1871; and also all the right of way granted by the State of Louisiana or by the United States" (Record, pp. 57-80).

After execution of the alleged mortgage of September 4, 1872, the Baton Rouge Company, so far as the record discloses, was practically dormant for a period of nearly ten years. As already

noted, there is no evidence that the Company ever issued any bonds under the mortgage, and it is established by the various documents offered in evidence that the Baton Rouge Company never definitely located its projected railroad, never constructed any part of its projected railroad, and never took any steps necessary to enable it to earn the land grant authorized by Section 22 of the Act of March 3, 1871. (Opinion of General Attorney Brewster, record, pp. 207, 209, 210; letter of Secretary Teller to President Arthur, dated March 13, 1883, and exhibits filed therewith, record, p. 226; *New Orleans Pacific Railway Company vs. Parker*, 143 U. S. 42, *supra*.)

On December 29, 1880, the Board of Directors of the Baton Rouge Company adopted a resolution authorizing the President and Secretary of the Company to transfer to the New Orleans Pacific Railway Company, a corporation organized under the laws of Louisiana, with power also to construct a railroad between New Orleans and Shreveport, all of the right, title and interest of the Baton Rouge Company in and to the land granted to said Company by the Act of Congress approved March 3, 1871 (Record, pp. 84, 85). Acting under this authority, the proper officers of the Baton Rouge Company executed the assignment of the land granted, dated January 5, 1881, a copy of which assignment is annexed to the Answer of the Texas and Pacific Railway Company as Exhibit A (Record, p. 222), and reads as follows:

"This indenture, made the fifth day of January, one thousand eight hundred and eighty-one, between the New Orleans, Baton Rouge and Vicksburg Railroad Company, a corpora-

tion created and existing under and by virtue of a special act of the legislature of the State of Louisiana, approved December 30th, 1869, party of the first part, and the New Orleans Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the State of Louisiana, party of the second part, witnesseth—

That the said party of the first part, for and in consideration of the sum of one dollar lawful money of the United States of America to it in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is thereby acknowledged, and of other good and valuable consideration, has remised, released, and quitclaimed, and by these presents does remise, release, and quitclaim unto the said party of the second part and to its successors and assigns forever.

All the right, title and interest of the said party of the first part, its successors or assigns of, in, or to a certain grant of public lands granted to the said party of the first part by an act of the Congress of the United States, approved March 3d, 1871, and entitled 'An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes,' together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, its successors and assigns forever.

In witness whereof the said party of the first part hath caused its corporate seal to be

hereunto affixed, and these presents to be signed by its president and secretary, the day and year first above written.

W. H. BARNUM, President

WM. M. BARNUM, Secretary.

Sealed and delivered in
the presence of

CHAS. L. BEAMAN,

CHAS. EDGAR MILLS,

CHARLES NETTLETON, [SEAL]

Commissioner for Louisiana in New York.

STATE OF NEW YORK, }
City and County of New York, } ss:

Be it remembered that on this 5th day of January, A. D. 1881, before me, CHARLES NETTLETON, a commissioner of the State of Louisiana in New York, residing in said City of New York, personally appeared WILLIAM H. BARNUM, president, and WILLIAM M. BARNUM, secretary, to me well known to be the individuals named in, and who executed, the foregoing instrument, and acknowledged to me that they did sign, seal, and deliver the same as their free act and deed on the day and year therein mentioned, and for the consideration, uses, and purposes therein expressed.

In witness whereof I have hereunto set my hand and affixed my official seal this 5th day of January, A. D. 1881.

(SEAL)

CHARLES NETTLETON

Commissioner for Louisiana in New York,
117 Broadway N. Y. City."

At the next meeting of the Stockholders of the Baton Rouge Company, the action thus taken by the Board of Directors and officers was approved,

ratified and confirmed, the transfer of the land grant having been previously accepted both by the New Orleans Pacific Railway Company and by the Department of the Interior (Record, pp. 87, 88, 93).

The New Orleans Pacific Railway Company thereupon proceeded to construct its road and earn the land grant (Record, p. 172).

As we understand the appellant's position, they now contend that the grant to the Baton Rouge Company being in the nature of a grant *in presenti*, as distinguished from a grant *in futuro*, or mere promise of a grant, fee simple title to the granted lands at once vested in the Baton Rouge Company and became subject to the lien of the alleged mortgage of September 4, 1872. In support of this position the appellants in their brief below appear to rely largely upon expressions found in briefs filed by Judge Dillon and others in the Interior Department and before Committees of Congress (Brief, pp. 19 *et seq.*). If, and in so far as these expressions support the position of the appellants, they conflict with opinions of the Attorney General and of the Supreme Court.

Attorney General Brewster in his opinion dated June 13, 1882 (Record, p. 213), says:

"But the grant thus made is in the nature of a float. It is of sections to be afterward located, their location depending upon the establishment of the line of the road. Until this is definitely fixed the grant does not attach to any specific tracts of land. Upon the line of the road being definitely located, the grant then first acquires precision, and the Company becomes invested with an inchoate title to the particular lands covered thereby, which can ripen into a perfect legal title only

as the construction of each section of twenty miles of road is completed and approved, when the right to patents for the lands opposite to and coterminus with such constructed sections accrues."

Similarly, Mr. Justice BROWN in *New Orleans Pacific Railway Company vs. Parker*, 143 U. S., says (p. 57) :

"As the grant was, by Section 9, of the lands not sold, reserved or otherwise disposed of at the time the route of the road was definitely fixed, it is settled in this Court that the title to any particular lands would not pass until the line was so located, because until that time it could not be definitely ascertained what lands had been otherwise disposed of."

On October 27, 1881, and November 17, 1882, the New Orleans Pacific Railway Company filed with the Department of the Interior maps of constructed road between New Orleans and Shreveport aggregating 328 miles, all of which except 68 miles acquired by purchase, had been constructed by the New Orleans Pacific Railway Company. This mileage had been previously examined by a Commissioner representing the Department of the Interior, who reported that all portions of the line were constructed in substantial compliance with the law and the instructions of the Department. On March 13, 1883, the Commissioner's reports were submitted to President Arthur by Secretary Teller, with the recommendation that said 328 miles of road, exclusive of the 68 miles acquired by purchase, be accepted and that patents for such lands as may have been earned by the construction be issued to the New Orleans Pacific Railway Company upon its compliance with the law

and regulations in such case made and provided. On March 16, 1883, the Secretary's recommendations were approved by the President (Record, pp. 227-229).

On May 22, 1883, Acting Land Commissioner Harrison, referring to the action of the President, advised the New Orleans Pacific Railway Company that the Interior Department in adjusting the land grant would treat the dates of the filing of the two maps heretofore mentioned, October 27, 1881, and November 17, 1882, as the dates of the definite location of the road (Record, pp. 139-142). These dates of definite location were accepted by the New Orleans Pacific Railway Company, and from time to time thereafter patents were issued to the New Orleans Pacific Company (Record, pp. 138, 230).

On April 16, 1883, the New Orleans Pacific Railway Company executed to John F. Dillon and Henry M. Alexander as Trustees, a mortgage or deed of trust upon the lands embraced in the land grant in question, to secure an issue of bonds to be known as its "Land Grant and Sinking Fund Bonds" (Record, p. 257). This instrument was modified by Supplemental Indenture dated January 5, 1884, so as to permit the issuance of bonds in advance of the execution of patents for the granted lands (Record, p. 286). The Land Grant and Sinking Fund Bonds were not direct obligations of the New Orleans Pacific Railway Company, but were payable only out of the proceeds of sale of mortgaged lands, it being provided in the mortgage that the lands should be sold from time to time by the mortgage trustees.

In discharging their trust, particularly in connection with sales of the land, the mortgage trustees found themselves embarrassed by reason of claims

asserted on behalf of persons, claiming to hold bonds of the Baton Rouge Company issued under the alleged mortgages of October 1, 1870, and September 4, 1872. Although the title of the New Orleans Pacific Railway Company was expressly confirmed by the Act of Congress approved February 8, 1887, hereinafter referred to, the trustees in order further to quiet their title to land grant, and that of their grantor, brought suit in the United States Circuit Court for the Eastern District of Louisiana in 1890 naming as defendants

New Orleans Pacific Railway Company,
 New Orleans, Baton Rouge and Vicksburg
 Railroad Company,
 Certain individuals claiming to be bondholders,
 and
 Union Trust Company of New York, as trustee
 of the alleged mortgages of October 1,
 1870, and September 4, 1872.

The Union Trust Company was duly served with process, but failed to appear, suffering the entry of a decree *pro confesso*. This decree which the Texas and Pacific Railway Company has pleaded, as a complete bar to the prosecution of the present suit, adjudges among other things,

“* * * that the said mortgages made unto the complainant constitute a valid and first lien on all the lands granted by said Act of Congress of 1871, and confirmed by the said Act of 1887; and that the mortgage made on behalf of the New Orleans, Baton Rouge and Vicksburg Railroad Company by Calvin H. Allen, appearing as its President before J. T. Beck, Notary, at New Orleans, September 4, 1872, unto the Union Trust Company of New York * * * did not and does not cover,

attach to mortgage, hypothecate or affect the lands patented by the United States to the New Orleans Pacific Railway Company, March 3, 1885, under said Act of Congress of March 3, 1871, Chapter 122, or any part thereof, or any of the lands patented to the said New Orleans Pacific Railway Company since March 3, 1885, under said Acts of 1871 and 1887 or selected or due under said laws and creates no lien thereon or right in or to the same or any part thereof." (Record, pp. 231 *et seq.*)

The Texas and Pacific Railway Company was not a party to the above suit, but, as it is sought to be held liable for payment of the Baton Rouge Bonds only by reason of its alleged assumption of the obligations of the New Orleans Pacific Railway Company, it claims the right to plead any judgment or interpose any defense which would be available to the New Orleans Pacific Company.

In this connection, it is important to point out precisely the relation existing between the New Orleans Pacific Railway Company and The Texas and Pacific Railway Company. That relation is defined and established by written instrument a copy of which is annexed to the answer of the Texas and Pacific Railway Company marked Exhibit B (Record, p. 50) which reads as follows:

ARTICLES OF CONSOLIDATION

NEW ORLEANS PACIFIC RAILWAY CO.

WITH

THE TEXAS & PACIFIC RAILWAY CO.

JUNE 20TH, 1881.

THIS INDENTURE, made this 20th day of June, in the year of our Lord one thousand eight hundred

and eighty-one, by and between the NEW ORLEANS PACIFIC RAILWAY COMPANY, a corporation created by, and under the laws of the State of Louisiana, party of the first part, and THE TEXAS & PACIFIC RAILWAY COMPANY, a corporation created by and under the laws of the United States, and having and owing certain franchises under the laws of Texas party of the second part.

WITNESSETH, That the said party of the first part, for and in consideration of the sum of one hundred dollars, lawful money of the United States, to it in hand paid, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for the other and further consideration hereinafter to be mentioned, hath consolidated itself with the party of the second part under its own proper and corporate name of "The Texas & Pacific Railway Company", on the terms and conditions herein and hereby agreed upon, by granting, bargaining, selling, aliening, remising, releasing, conveying and confirming, and by these presents granting, bargaining, selling, aliening, remising, assigning, transferring, conveying and confirming unto the party of the second part, its successors or assigns, all the franchises, corporate rights or privileges of the said party of the first part, together with its track, roadbed, buildings, rolling stock, engineers' tools, bonds, stocks, grants, privileges, property, real and personal, and every right, title and interest in and to any franchises or property, real or personal, and all rights, of every name and kind which the party of the first part has any right, privilege or interest, situated and being in the State of Louisiana, or in the State of Texas, or elsewhere: The

object and intent of this contract and agreement being to so merge the rights, powers and privileges of the party of the first part into the party of the second part, so that the party of the second part, under its own charter, corporate name and organization, shall, without impairing any existing right, exercise in addition thereto all the powers, rights, privileges and franchises, and own and control all the properties that the party of the first part now exercises and owns, or by its charter and by-laws it has the right to exercise, own or control.

Provided, however, that the land and land grants acquired or to be acquired by the party of the first part from the government of the United States, either directly or indirectly, or from the State of Louisiana, or from the New Orleans, Baton Rouge & Vicksburg Railroad Company, or from any other source, other than lands necessary and needful for railway purposes, are expressly exempted and excluded from the provisions of this contract, and do not pass by any terms or provisions thereof.

And provided further, that the franchises of the party of the first part (to be and remain a corporation until such time as may hereafter be agreed upon for its dissolution) shall not be impaired or infringed upon by anything contained in this contract.

And provided, also, that nothing in this contract contained is intended to, or shall impair any legally existing contract by mortgage or otherwise, of the party of the first part.

The further consideration for this contract and agreement is, that the party of the second part shall receive from the party of the first part, or its shareholders, share for share of its capital stock of one hundred dollars per share, issued or to be

issued (not exceeding the rate of twenty thousand dollars per mile, for 400 miles of road, which, it is estimated, will be constructed under the existing franchises of the party of the first part); that is to say: The party of the second part shall deliver to the party of the first part, or to such person as the latter shall direct, or to its stockholders, one share of its capital stock of one hundred dollars per share, for a like amount of the capital stock of the party of the first part now outstanding, when and as transferred to the party of the second part, and as further stock of the party of the first part is issued (not exceeding twenty thousand dollars per mile, as aforesaid) similar exchanges and transfers shall be made until all the stock of the party of the first part (not exceeding the rate per mile as aforesaid) shall have been issued.

Provided that the stock of the party of the first part received by the party of the second part in exchange, under this agreement, shall not be canceled, but shall be held and used by the party of the second part for the purpose of preserving to the said second party the enjoyment of all rights and privileges pertaining to the ownership thereof, until otherwise provided by authorized corporate action, the corporate existence of the party of the first part shall be maintained, and its power to carry out all existing contracts, and to mortgage any land grant it has acquired, or may acquire, from the New Orleans, Baton Rouge & Vicksburg Railroad Company or otherwise, remain wholly unimpaired hereby.

In witness whereof, the parties aforesaid, being the contracting parties of the first and second part, have mutually executed this indenture, under the corporate seals of the said Companies, and attested

by the signatures of the proper officers, the day and date above.

TEXAS & PACIFIC RAILWAY CO.

By JAY GOULD, President

[L. S.] Attest, C. E. SATTERLEE, Secretary

NEW ORLEANS PACIFIC RAILWAY CO.

By E. B. WHELOCK, President

[L. S.] Attest, WM. S. NICHOLSON, Secretary

Recorded, and original filed in office of Secretary of State of the State of Louisiana, June 28, 1881.

By the terms of this instrument, which bears date June 20, 1881, the Texas and Pacific Railway Company in consideration of the issue of its own stock at the rate of \$20,000 per mile, acquired the lines of railroad constructed and in process of construction by the New Orleans Pacific Railway Company; it will be noted that the instrument expressly provides, however,

“that the land and the land grants acquired or to be acquired by the party of the first part (New Orleans Pacific Railway Company) from the Government of the United States, either directly or indirectly, or from the State of Louisiana or from the New Orleans, Baton Rouge and Vicksburg Railroad Company or from any other source, other than lands necessary and needful for railway purposes, are expressly exempted and excluded from the provision of this contract and do not pass by any terms or provisions thereof” (Record, p. 51).

The foregoing statement is not intended as a complete summary of all the documents in evidence, some of which the District Court found “so remote as to fall outside of any reasonable limit”, but is intended merely to present in narrative form the

salient facts set out under the four following defences specially pleaded in the answer of the Texas and Pacific Railway Company:

1. That the Baton Rouge Company never acquired title to the land grant lands, and that its alleged mortgage of September 4, 1872, never became operative as a lien thereon (Record, pp. 30-31).

2. That prosecution of the action is barred by the decree of the Circuit Court of the United States for the Eastern District of Louisiana in the suit of Dillon and Alexander against the New Orleans Pacific Railway Company and others (Record, pp. 39-44).

3. That the Texas and Pacific Railway Company is in no way connected with the land grant or the transactions referred to in the complaint (Record, pp. 44-46).

4. That the suit is barred by limitations and by the laches of the complainants (Record, p. 47).

For the purpose of this examination, we will discuss the above propositions in their reverse order, taking up first the question of limitations and laches which was the basis of the decision of the learned District Court dismissing the bill and which was also the decision of the learned U. S. Circuit Court of Appeals affirming the judgment of the court below.

Argument.

I.

1. "Equity aids the vigilant, not those who slumber on their rights."
2. "A Court of Equity which is never active in relief against conscience or public convenience has always refused its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth a Court of Equity in activity, but conscience, good faith and reasonable diligence."
3. The plaintiffs and their testator having delayed action upon the alleged Baton Rouge bonds beyond the period of limitations prescribed by the statutes of both New York and Louisiana, and beyond that period demanded by good faith, prosecution of the suit is barred by lack of diligence and laches.

The appellee, Texas and Pacific Railway Company, avers in its answer as a special defense to the prosecution of the alleged cause of action that

"The plaintiffs and their predecessors in title to the bonds upon which this cause is attempted to be founded, have made no timely and diligent effort to question the transactions referred to in the complaint herein or the title of the New Orleans Pacific Railway Company or its grantees to the lands granted by the 22nd Section of the Act of Congress approved March 3, 1871, and are guilty of such lack of diligence and of such laches in the premises that no complaint may now be made in respect

of said bonds or the matters and things referred to in the bill of complaint herein" (Record, p. 47).

The appellants contended in Court below that this defense is not broad enough to cover limitations.

"The defendant did not plead the statute of limitations of either New York or Louisiana. Hence it cannot be urged as a bar."

The appellee does not even admit that the above defense would not be a good plea of limitations in a common law action.

It is, however, well settled that the statute of limitations as enforced in equity need not be specially pleaded; indeed it has been the practice of Federal Courts sitting in equity to apply the statute of limitations on hearings on demurrer. The following cases may be consulted:

Harpending vs. The Dutch Church, 16 Pet. 455.

Badger vs. Badger, 2 Wall. 87.

Coddington vs. Railroad Company, 103 U. S. 409.

Metropolitan Bank vs. St. Louis Dispatch Company, 149 U. S. 436.

In the case first cited Judge CATRON says:

"It is insisted that the act of limitations is not relied on by express reference to the Statute of New York. We think it was unnecessary to rely in terms on the statute. It was more convenient not to do so. The bill seeks discoveries, the right to have which twenty years' adverse possession could only bar. It also seeks an account of the proceeds of sales of parts of the estate and an account of the rents

and profits of other parts, assuming the respondents to be trustees for the complainants. To this aspect of the bill six years forms a bar to a decree. *The Court is judicially bound to take notice of the statutes when the facts are stated and relied on as a bar to further proceedings if they are found sufficient*" (Our italics.)

In *Badger vs. Badger*, the Supreme Court, speaking by Mr. Justice GRIER, said (p. 95) :

"The party who makes such appeal should set forth in his bill specifically what impediments there were to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the Chancellor may justly refuse to consider his case, on his own showing, *without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.*" (Our italics.)

These authorities disposed of the claim that the defence of limitations is not sufficiently pleaded in the appellee's answer, as well as the claim that the appellee as a foreign corporation cannot plead the statute of limitation; the statute is always enforced in equity without reference to the rules of common law pleading or technical statutory requirements.

(a) *The suit is barred by the Statutes of Limitation in force in New York and Louisiana.*

The alleged bonds of the Baton Rouge Company do not purport to be obligations of the Texas and Pacific Railway Company.

The appellee, the Texas and Pacific Railway

Company, is sought to be held liable in this suit on the theory that payment of the alleged bonds was in some manner assumed originally by the New Orleans Pacific Railway Company and ultimately through the latter by the Texas and Pacific Railway Company. Thus the learned District Court (Record, p. 341) :

“* * * concluded that any such liability, if it exist at all, must be one that is secondary in character and resulting from some trust *ex delicto* to be implied (if such implication can arise) from some state of fact shown and not upon any direct undertaking by the New Orleans Pacific Company or the defendant to pay the debt of another, to wit, the Baton Rouge Company.”

Section 381 of the New York Code of Civil Procedure prescribes a twenty-year limitation for actions upon sealed instruments.

Section 382 prescribes a six-year limitation for

“1—an action upon a contract liability, express or implied * * *”

and for certain other actions specified in the section.

Sections 383-387 prescribe shorter periods of limitations for various actions not here material.

Section 388 provides that

“An action the limitation of which is not specially prescribed under this or the last title, must be commenced within ten years after the cause of action accrues.”

Section 390a provides that

“Where a cause of action arises outside of this State, an action cannot be brought in a Court of this State to enforce such cause of

action after the expiration of the time limited by the laws of the State or country where the cause of action arose for bringing an action upon said cause of action, except where the cause of action originally accrued in favor of a resident of this State."

By Article 3544 of Merrick's Louisiana Code ten years is the period of prescription for all personal actions excepting those for which a shorter period is provided.

Obviously the liability sought to be enforced against The Texas and Pacific Railway Company by reason of its alleged consolidation with the New Orleans Pacific Company arises, if at all, not upon the bonds as sealed instruments of the Texas and Pacific Railway Company, which they do not purport to be, but upon a "contract obligation, express or implied," a liability which is barred in six years by Section 382 of the New York Code.

Suit upon such a cause of action at the very latest should have been commenced within six years after the maturity of the alleged Baton Rouge bonds, on September 4, 1902. The suit was, however, not commenced until May, 1913, more than ten years after the maturity of the alleged bonds. This is beyond the period of limitation prescribed both by Sections 382 and 388 of the New York Code, as well as Article 3544 of the Code of Louisiana. The contention of the appellants that the statutes of limitation are inapplicable because the suit is brought to enforce an express trust might conceivably be made if the suit were against the mortgage trustee to enforce the trusts of the mortgage, but we fail to see its application to a suit against the Texas and Pacific Railway Company under the facts in this case.

(b) *The suit is barred by the laches of the Plaintiffs and their testator.*

It may be conceded that the right of the plaintiffs to foreclose the alleged Baton Rouge mortgage or to seek equitable relief against the Baton Rouge Company might properly be entertained in a court of equity so long as the principal obligation of the bond remained enforceable at law. But such is not this case. This suit is brought to enforce what in any aspect is only an implied liability, one which in the nature of things ought to be asserted promptly and not delayed until the transaction is obscured by lapse of time and evidence lost by the death of witnesses and changes in the value of the property.

Jenkins vs. Pye, 12 Pet. 251.

Marsh vs. Whitmore, 21 Wall. 178.

Brown vs. County of Buena Vista, 95 U. S. 157.

Speidel vs. Henrici, 120 U. S. 377.

Gallihier vs. Cadwell, 145 U. S. 368.

Foster vs. Mansfield, Coldwater and Lake Michigan Railroad Company, 146 U. S. 88.

Patterson vs. Hewitt, 195 U. S. pp. 309-317.

O'Brien vs. Wheelock, 184 U. S. 450-493.

In the case of *Brown vs. County of Buena Vista*, the Supreme Court, speaking by Mr. Justice SWAYNE, said (p. 161):

"Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this Court (*Smith vs. Clay*, Amb. 645. See also *Story*, Eq. Jur., sect. 1520a; 94 U. S., *supra*; *Sample vs. Barnes*, 14 How. 70; *Walker et al. vs. Robbins et al.*, *id.*, 584; *Creath's Administrator vs. Sims*, 5 *id.*, 192;

Bateman vs. Willoe, 1 Sch. & Lef. 201; *Murray vs. Graham*, 6 Paige (N. Y.), Ch. 622; *Callaway vs. Alexander*, 8 Leigh (Va.), 112; *Powell vs. Stewart*, 17 Ala. 719; *Riddle vs. Barker*, 13 Cal. 295).

"The law of laches, like the principle of limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose and welfare of society. A departure from it would open an inlet to the evils intended to be excluded."

In the case last cited, the Supreme Court, speaking by Mr. Justice BROWN, said (p. 99):

"The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath and hard to disprove, and hence the tendency of Courts in recent years has been to hold the plaintiff to a rigid compliance with the law, which demands not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

In the case of *Patterson vs. Hewitt*, 195 U. S. p. 317, the Supreme Court, speaking by Justice BROWN, said:

"The defense of laches which permitted dismissal of the bill in this case has so often been made the subject of discussion in this Court that a citation of cases is quite unnecessary. Some degree of diligence in bringing suit is required in all systems of jurisprudence. In actions at law the question of diligence is determined by the words of the Statute. If an action be brought a day before the statutory

term expires, it would be sustained; if a day after, it would be defeated. In suits in equity the question is determined by the circumstances in each particular case. * * * True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed; complainant's knowledge or ignorance of the facts constituting the cause of action, as well as the diligence in availing himself of the means of knowledge within his control, are all material to be considered on the question whether the suit was brought without unreasonable delay."

The Supreme Court say in discussing the matter of diligence "Indeed in some cases, the diligence required is measured by months rather than by years (citing authorities) and in others a delay of two, three or four years has been fatal (citing authorities)".

As already pointed out, Mr. Waller testified that the bonds were found among his father's papers upon his death in 1893, and that he *thought* his father had owned them for seven or eight years (Record, p. 56). Each of the bonds had 52 coupons attached, indicating non-payment of interest since September 4, 1876 (Record, p. 5). At any time during the lifetime of the elder Waller he was at liberty to call upon the trustee of the alleged Baton Rouge mortgage to institute foreclosure proceedings, and upon its failure to do so, to institute proceedings in his own name and in his own right as a bondholder, naming the trustee as a party defendant; at liberty also to bring in either the New Orleans Pacific Railway Company or the Texas and Pacific Railway Company, or both, to enforce

against either or both of them any secondary liability. This the elder Waller failed to do over a period of seven or eight years. After his death his executors and trustees remained quiescent for more than *twenty* years, when after the loss of the evidence which the elder Waller alone could give as to the source and origin of his title, if any, to the alleged bonds, suit is commenced against the Texas and Pacific Railway Company, a stranger to the transaction, without offering any evidence as to the legality of the alleged bonds which have been in default nearly *40* years and without suggesting any fact in excuse of their delay, excepting that they did not learn of the consolidation of the Texas and Pacific Railway Company and the New Orleans Pacific Company and the prior adjudication against the mortgage trustee until 1909 (Record, p. 56). It appears, however, that the agreement of consolidation was a matter of public record and the fact of the consolidation was a matter of general public knowledge which might readily have been ascertained by reference to any standard publication of railroad statistics; and, moreover, as shown by the testimony of Major Abrams, the Texas and Pacific Railway Company was openly and notoriously in possession of the railways of the New Orleans Pacific Company, paying taxes and exercising the rights of ownership for a period of more than thirty years prior to the institution of the present suit (Record, pp. 344-6). The plea of ignorance is therefore entitled to but slight weight; but, accepting it at its face value, it offers no excuse for the failure of the elder Waller or of the plaintiffs themselves, to pursue their remedies against the Baton Rouge Company or the New Orleans Pacific Company. Certainly there is no analogy to the case

of *Boyd vs. The Northern Pacific Railroad Company and others*, 228 U. S. 482, upon which the appellants rely. In that case the Court found as a fact (p. 509) that the plaintiff's delay was not the result of inexcusable neglect.

"* * * but in spite of diligent effort to put himself in the position of a judgment creditor of the Coeur D'Alene so as to be able to proceed in equity to collect his debt. He accomplished this result only after protracted litigation beginning in 1887 and continuing through the present appeal (1913)."

II.

The appellee, The Texas and Pacific Railway Company, is in no manner connected with the transactions referred to in the complaint and in no way liable for any obligation of either the New Orleans Pacific Railway Company or the New Orleans, Baton Rouge and Vicksburg Railroad Company.

No attempt was made by the appellants to establish any direct connection between the Baton Rouge Company and the Texas and Pacific Railway Company.

The suit is brought against the Texas and Pacific Railway Company solely by reason of the agreement of June 20, 1881, annexed to the answer of the appellee as Exhibit B (Record, p. 50). This instrument transfers to the Texas and Pacific Company the *railroad* properties of the New Orleans

Pacific Company. By its express terms, the land grant is excluded from the operation of the instrument and reserved to the New Orleans Pacific Company; and it has continued under the control of the New Orleans Pacific Company and its grantees up to the present time; in fact, no patent for the land grant lands was issued until 1885, four years after the transaction between the Texas and Pacific Railway Company and the New Orleans Pacific Railway Company took place, and all patents were issued directly to the New Orleans Pacific Railway Company (Record, p. 230). The learned District Court in its opinion says (Record, p. 339):

"There was a consolidation of the New Orleans Company and the Texas Pacific Railroad Company, from which resulted the defendant the Texas and Pacific Railway Company, and the latter Company became bound to pay all of the then existing indebtedness of the New Orleans Company, though unless inferentially it did not become bound to pay those of the Baton Rouge Company."

This statement is evidently made upon the mistaken assumption that the Texas and Pacific Company and the New Orleans Pacific Company were consolidated pursuant to the provisions of Sections 1, 4 and 6 of the Act of March 3, 1871.

An examination of these sections will satisfy the Court that they are not applicable.

Section 1 authorizes the Texas and Pacific Company to construct its line from Marshall, Texas, *westwardly* to the Pacific Ocean.

Section 4 authorizes the Texas and Pacific Company to consolidate with any Company thereto-

fore chartered by Congressional, State or Territorial authority *on the route prescribed in Section 1 of the Act.*

Section 6 prescribes that in any consolidation made under Section 4 the indebtedness or other obligations of the Company with which the consolidation is effected shall be assumed by the Texas and Pacific Company.

The lines of the New Orleans Pacific Company were not upon the route prescribed by Section 1 of the Act; they were not acquired by the Texas and Pacific Company under authority of Section 4 and did not pass to the Texas and Pacific Company upon the conditions prescribed in Section 6. The lines were acquired by the Texas and Pacific Company in the exercise of franchises which it had acquired by consolidation with the Southern Pacific Railway Company of Texas and the Southern Transcontinental Railway Company, which companies were authorized to acquire by purchase lines extending *eastwardly* to the Atlantic seaboard, these consolidations having been effected under the laws of Texas and ratified on the part of Congress by Act approved June 22, 1874 (18 Stat. at Large, 197).

The only obligation assumed by the Texas and Pacific Company under the agreement of June, 1881, was the express obligation to pay for the railroad of the New Orleans Pacific Company through the issue of its own stock at the rate of \$20,000 per mile; and any attempt to superadd to that obligation an undertaking to assume the indebtedness and liabilities of the New Orleans Pacific Company is clearly inadmissible, especially so when the alleged implied or superadded liability

is asserted in respect of land grant lands which, by express provisions of the instrument, never passed to the Texas and Pacific Company, but were reserved and held by the New Orleans Pacific Company.

III.

The decree of the United States Circuit Court for the Eastern District of Louisiana in the case of John F. Dillon and Henry M. Alexander, Trustees, against the New Orleans Pacific Railway Company and others is a bar to the prosecution of this suit.

The appellants stated in their brief in court below:

"The first question involved in this case is, whether or not the mortgage or deed of trust executed by the New Orleans, Baton Rouge and Vicksburg Railroad Company to the Union Trust Company of New York to secure the payment of bonds sued on in this case was a valid and binding mortgage and created a lien upon the '*right of way*' and the '*alternate sections of land*' granted to that road by the Act of Congress of March 3, 1871."

Yet nowhere in the brief do we find any direct reference to the decree of the United States Circuit Court for the Eastern District of Louisiana, wherein it was adjudged, among other things

"that the mortgage made on behalf of the New Orleans, Baton Rouge and Vicksburg Rail-

road Company by Calvin H. Allen, appearing as its President before T. J. Beck, notary, at New Orleans, September 4, 1872, unto the Union Trust Company of New York * * * did not and does not cover, attach to, mortgage, hypothecate or affect the lands patented by the United States to the New Orleans Pacific Railway Company, March 3, 1885, under said Act of Congress of March 3, 1871, Chapter 122, or any part thereof, or any of the lands patented to the said New Orleans Pacific Railway Company since March 3, 1885, under said Acts of 1871 and 1887 or selected or due under said laws, and creates no lien thereon or right in or to the same or any part thereof" (Record, pp. 311, 312).

The Texas and Pacific Railway Company was not a party to the above-mentioned suit, but, as it is now sued upon an alleged liability of the New Orleans Pacific Company it is entitled to plead in bar any decree which would be available to the New Orleans Pacific Company as the primary debtor (*United States vs. Allsbury*, 4 Wall. 186).

The only question, therefore, is whether the decree is binding upon the plaintiffs who were not parties to the suit excepting in so far as they were represented therein by the mortgage trustee.

It appears that the Union Trust Company, as trustee of the alleged mortgage of September 4, 1872, was named as one of the parties defendant to the suit; that process of subpoena was duly issued and served upon it according to law and the orders of the Court; and that upon its failure to appear, a decree *pro confesso* was ordered by Judge PARDEE (Record, p. 301).

That a decree so rendered binds not only the

mortgage trustee but also the individual bondholders, is well settled by the authorities:

Kerrison vs. Stewart, 93 U. S. 155.

Shaw vs. Little Rock and Ft. Smith Railroad Company, 100 U. S. 605.

Richter vs. Jerome, 123 U. S. 233.

Beals vs. Illinois, Missouri and Texas Railway Company, 133 U. S. 290.

The case of *Raphael vs. The Wasatch and Jordan Valley Railway and others*, 201 Fed. Rep. 854, recently decided by the Circuit Court of Appeals for the Eighth Circuit, is directly in point in all of its fundamental features.

From that case it appears that Nathaniel W. Raphael, as holder of certain alleged bonds of the Wasatch and Jordan Valley Railway Company, brought suit for the foreclosure of a mortgage alleged to secure the said bonds, naming the trustee as one of the parties defendant. The trustee was duly summoned but failed to appear, suffering a default, and a decree was thereafter rendered in the action holding the mortgage sued on to be ineffectual. Raphael died after entry of the decree, and his bonds passed to his son by operation of law. Subsequently his son purchased in the open market six bonds of the same series as those involved in the suit unsuccessfully prosecuted by his father. He thereupon proceeded as holder of the bonds acquired from his father, as well as those purchased subsequently, to relitigate the question involved in the earlier suit; and the decree in the earlier suit having been pleaded in bar the plea was held good on the theory that all holders of bonds issued under the mortgage to the Union Trust Company were bound by its default in the

suit brought by Nathaniel W. Raphael, to the same extent as if the Trust Company had appeared in the action. District Judge W. H. MUNGER, speaking for the Court said (p. 587):

"As to the remaining 6 bonds, which he has subsequently purchased, he is equally bound by that decree, for the reason that the Union Trust Company, trustee of the mortgage, was a party to that action and bound by the judgment therein. It being a party to that action he as beneficiary is equally bound. In *Woods v. Woodson*, 100 Fed. Rep., 515-519, Judge THAYER, writing the opinion for this Court, said: 'It is further claimed in behalf of the appellant that the decree against The Farmers' Loan & Trust Company adjudging the invalidity of the joint deed of trust is not binding upon him, because he was not a party to the suit in which the decree was rendered, even if it was binding upon his trustee, The Farmers' & Trust Co., who was duly served with process. This point, however, must be ruled against the appellant on the strength of the following cases: *Beals v. Railroad Co.*, 133 U. S. 290; *Kerrison v. Stewart*, 93 U. S. 155; *Shaw v. Railroad Co.*, 100 U. S. 605; *Richter v. Jerome*, 123 U. S. 233; and especially on the strength of the decision in *Beals v. Railroad Company*, which is on all fours with the case in hand. In the latter case a bill was filed against the trustee in a deed of trust to cancel the same, but the complainant, Beals, who was a bondholder, was not made a party thereto. Nevertheless, it was ruled that the bondholders were parties by representation and that a decree cancelling the mortgage was obligatory upon the bondholders as well as upon their trustee.' In addition to the cases cited in the excerpts from the opinion of Judge THAYER, see *Farmers' Loan & Trust Co. v. Kansas City, etc., Co.*, 53 Fed. Rep. 182, 185; *Heckman v. U. S.*, 244 U. S. 413."

Under the above authorities, the appellants and their predecessors in the ownership of the alleged Baton Rouge bonds are bound by the decree against the Union Trust Company to the same extent as if they themselves had been parties defendant; and we fail to see how the appellants can litigate anew questions covered by the former adjudication.

IV.

The mortgage of the New Orleans, Baton Rouge and Vicksburg Railroad Company alleged to have been executed September 4, 1872, was inoperative as a lien upon the land grant lands afterwards patented to and acquired by the New Orleans Pacific Railway Company.

As discussion of the fundamental questions raised by the appellants seems foreclosed by the decree which the appellee has pleaded in bar of the suit, counsel are content in conclusion to deal very briefly with the merits of the controversy.

(a) The Act of Congress granted to the Baton Rouge Company or its assigns no title to the specific lands, but merely a right in the nature of an assignable chose in action to acquire title to specific lands by fulfilling the conditions of the grant.

The cardinal error of the appellants lies in their assumption that the Act of Congress "vested in the Baton Rouge Company a valid title in fee to the lands granted".

It has already been shown that under Section 9 of the Act of Congress no title to specific lands vested until the projected railroad was "definitely fixed", and in the meanwhile the grant was as stated above, a mere chose in action.

Missouri, Kansas and Texas Railway Company vs. Kansas Pacific Company, 97 U. S. 491.

Van Wyck vs. Knevals, 106 U. S. 360.

Opinion of Attorney General Brewster, *supra*.

(b) *The filing by the Baton Rouge Company of maps indicating the general route of its road and the withdrawal from pre-emption and homestead entry of lands coterminus with the route, did not vest the Baton Rouge Company with title to the lands withdrawn or any part thereof.*

The maps filed by the Baton Rouge Company in the Department of the Interior, one of which antedated the alleged mortgage of September 4, 1872, were maps of general location filed pursuant to Section 12 of the Act of Congress. The filing of such a map in advance of definite location was authorized to protect the Company against wholesale entries made by prospective settlers following the trail of the Company's civil engineers. It permitted the withdrawal of lands from homestead entry, but conferred no new or additional rights upon the Baton Rouge Company.

Kansas Pacific Railway Company vs. Dunmeyer, 113 U. S. 629.

Buttz vs. Northern Pacific Railway Company, 119 U. S. 55.

U. S. vs. Southern Pacific Company, 146 U. S. 570, particularly p. 599.

(c) *The Baton Rouge Company having assigned its rights under the Act of Congress without definitely locating or constructing any part of its road, never acquired title to specific lands.*

It is settled by the rulings of the Interior Department and by the decisions of the Supreme Court, that title to the lands remained in the United States until it passed to the New Orleans Pacific Company upon the filing by the latter Company of its maps of definite location.

U. S. vs. New Orleans Pacific Railway Company, 124 U. S. 24.

New Orleans Pacific Railway Company vs. Parker, 143 U. S. 42.

Opinion of Attorney General Brewster, supra.

(d) *At the date of the execution of the alleged mortgage of September 4, 1872, the Baton Rouge Company had no power to mortgage after-acquired land grant lands.*

Even though the Baton Rouge Company had located its line of railroad and had constructed the same and had received patents for the granted lands, the alleged mortgage of September 4, 1872, would not have become a lien upon the lands; at that date the Company had no power to mortgage after-acquired property not appurtenant to its line of railroad.

Revised Code of Louisiana, Section 3308.

New Orleans Pacific Railway Company and others vs. Union Trust Company and others, 41 Fed. Rep. 717.

New Orleans Pacific Railway Company vs. Parker, 143 U. S. 42.

The Act of the Louisiana Legislature authorizing the Baton Rouge Company to mortgage after-

acquired property did not become effective until December 11, 1872. (Act No. 100 of the Acts of 1873, p. 293; Testimony of the Secretary of State of the State of Louisiana, record, p. 219.)

(e) *Even assuming that the granted lands had vested in the Baton Rouge Company, its title would have been cut off and extinguished by the Act of Congress approved February 8, 1887, which had the legal effect of a new grant.*

The above construction was placed upon the Act of March 3, 1876, by the Supreme Court of the United States in *United States vs. New Orleans Pacific Railway Company*, 124 U. S. 24. The Act of February 8, 1887, is *in pari materia* (24 Stat. at Large, 391).

In accepting the new grant made by the Act of February 8, 1887, the New Orleans Pacific Company did not assume any indebtedness of the Baton Rouge Company, but only such "duties and obligations" as were imposed upon it *by the Act of March 3, 1871*. The only "duties and obligations" imposed upon the Baton Rouge Company by the Act of March 3, 1871, were those relating to the opening of the lands for settlement and pre-emption, all of which were fully discharged by Messrs. Dillon and Alexander or their successors as trustees of the New Orleans Pacific Land Grant Mortgage.

(f) *The alleged mortgage of September 4, 1872, does not constitute a lien upon the rights of way of the railroad acquired by the Texas and Pacific Railway Company from the New Orleans Pacific Railway Company.*

The grant of a right of way to the Baton Rouge Company by Section 22 of the Act of March 3,

1871, was subject to the condition that its road should be constructed and used for the purposes designated (*St. Joseph and Denver City Railroad Company vs. Baldwin*, 103 U. S. 426).

The Baton Rouge Company never constructed any road or acquired any right of way to which its alleged mortgage could attach (*New Orleans Pacific Railway Co. vs. Parker*, 143 U. S. 42).

The undisputed evidence shows that the New Orleans Pacific Railway Company constructed its road through a settled country and acquired its entire right of way by purchase from the property owners, excepting a few miles—not exceeding 15—where the lines passed through unoccupied land, mostly swamp land and of no value. The evidence further shows that the Texas and Pacific Railway Company has been in open and notorious possession of the entire line between New Orleans and Shreveport for more than thirty years (Record, p. 315).

Conclusion.

V.

In support of the propositions of law and the authorities cited in support thereof, we respectfully submit the following argument on the part of the Texas and Pacific Railway Company.

In order to arrive at a clear understanding of appellant's case, we will give a short résumé of the undisputed facts upon which the appellant bases whatever cause of action he may have.

The plaintiff-appellant in this case is David J

Waller, Jr., and Levi E. Waller, Trustees under the Last Will and Testament of David J. Waller, deceased.

The parties named by the plaintiff as defendants in the Court below to this cause of action were The Texas and Pacific Railway Company, The New Orleans Pacific Railroad Company, and the Union Trust Company of New York.

The bill was dismissed before final hearing as to the Union Trust Company of New York. No subpoena has ever been issued, served or returned as to the New Orleans Pacific Railroad Company, so that the New Orleans Pacific Railroad Company has never been made a party to the record nor does the decree undertake to adjudicate any of its rights or liabilities in this case.

This leaves the record with the appellants named as plaintiffs in the Court below, and the Texas and Pacific Railway Company, as sole defendant.

The New Orleans, Baton Rouge and Vicksburg Railroad Company was incorporated under the Laws of Louisiana, in 1869. By the Twenty-second Section of an Act of Congress passed March 3rd, 1871, Chapter 122, 16th Statute, it was provided as follows:

"SEC. 22. That the New Orleans, Baton Rouge and Vicksburg Railroad Company, chartered by the State of Louisiana, shall have right to connect by the most eligible route to be selected by said company, with the said Texas Pacific Railroad at its eastern terminus, and shall have the right of way through the public land to the same extent granted hereby to the said Texas Pacific Railroad Company; and in aid of its construction from New Orleans to Baton Rouge, thence by the way of Alexandria, in said State, to connect with the said Texas Pacific Railroad

Company at its eastern terminus, there is hereby granted to said Company, its successors and assigns, the same number of alternate sections of public lands per mile, in the State of Louisiana, as are by this act granted in the State of California to said Texas Pacific Railway Company; and said lands shall be withdrawn from market, selected, and patents issued therefor, and opened for settlement and pre-emption, upon the same terms and in the same manner and time as is provided for and required from said Texas Pacific Railway Company, within said State of California: Provided, that said Company shall complete the whole of said road within five years from the passage of this act."

By Section Nine of the same Act there was granted to The Texas and Pacific Railway Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of said Railroad in California.

Section Twelve of the same Act provides as follows:

"SEC. 12. That whenever the said company shall complete the first and each succeeding section of twenty consecutive miles of said railroad, and put it in running order as a first class road in all its appointments, it shall be the duty of the Secretary of the Interior to cause patents to be issued conveying to said company the number of sections of land opposite to and conterminus with said completed road to which shall be entitled for each section so completed. Said company, within two years after the passage of this Act, shall designate the general route of its said road as near as may be, and it shall file a map of the same

in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories, and twenty miles within the State of California, to be withdrawn from pre-emption, private entry and sale; Provided, however, That the provisions of the act of September, eighteen hundred forty one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An Act to Secure Homesteads to actual settlers under public domain' approved May twenty, eighteen hundred sixty two, and the amendments thereto, shall be and the same are hereby, extended to all other lands of the United States on the line of said road when surveyed, except those hereby granted to said Company."

On the 11th day of November, 1871, the New Orleans, Baton Rouge and Vicksburg Railroad Company filed in the Department of the Interior a map of the general route of its road from Baton Rouge to Shreveport, and on the 13th day of February, 1873, a like map showing the general route of its road from New Orleans to Baton Rouge, and with the exception of filing these maps, the New Orleans, Baton Rouge and Vicksburg Railroad Company did absolutely nothing in the matter of carrying out the express conditions of the Land Grant, as embodied in said Section 22.

In 1871 and 1873 the lands along the general route as shown in the map filed with the Department of the Interior within the grant of the act of March 3, 1871, were withdrawn from entry and sale by Order of said Department.

On the 4th day of September, 1872, the New Orleans, Baton Rouge and Vicksburg Railroad

Company executed a mortgage for the purpose of securing a first mortgage seven per cent. Land Grant and Sinking Fund Gold Bond; said mortgage being to the Union Trust Company, Trustee. The amount of the gold bonds sought to be covered by this mortgage were twelve thousand bonds each for the denomination of one thousand dollars. This mortgage undertook to cover all of the land grant rights that the New Orleans, Baton Rouge and Vicksburg Railroad Company might receive under Section 22 of the Act of March 3rd, 1871.

At the date of the execution of this mortgage, the New Orleans, Baton Rouge and Vicksburg Railroad Company had taken no action to carry out the terms of the Land Grant Act except to file in the Department of the Interior a map of the general route of its road, and it has never undertaken to carry out any of the provisions of the said Land Grant Act other than the filing with the Department of the Interior a map of the general route of its road from Baton Rouge to Shreveport, and a like map showing the general route of its road from New Orleans to Baton Rouge.

It has never undertaken to construct this line of road, in fact it never commenced in any way the construction of its line of road.

The appellants herein allege that they are the owners of thirty of the bonds issued under the Mortgage of September 4th, 1872. How they became the owners of same and for what purpose these bonds were issued, it does not appear.

On the 5th day of January, 1881, the New Orleans Pacific Railroad Company became the owner, by conveyance from the New Orleans, Baton Rouge and Vicksburg Railroad Company, of all its interest in such grant of public lands, and this conveyance,

or assignment of its rights was accepted by the New Orleans Pacific Railroad Company and the conveyance and its acceptance were duly recognized by the Department of the Interior.

The conveyance of this right to the New Orleans Pacific Railroad Company was in the following terms:

"This indenture, made the 5th day of January, one thousand eight hundred and eighty one between the New Orleans, Baton Rouge and Vicksburg Railroad Company, a corporation created and existing under and by virtue of a special act of the Legislature of the State of Louisiana, approved December 30, 1869, party of the first part, and the New Orleans Pacific Railway Company, a corporation created and existing under and by virtue of the laws of the State of Louisiana, party of the second part, witnesseth:—

"That the said party of the first part, for and in consideration of the sum of one dollar (\$1) lawful money of the United States of America to it in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is thereby acknowledged, and of other good and valuable considerations, has remised, released and quit claimed, and by these presents does remise, release and quit claim unto the said party of the second part, and to its successors and assigns forever.

"All the right, title, and interest of said party of the first part, its successors or assigns, of, in, or to a certain grant of public lands granted to the said party of the first part by an act of the Congress of the United States, approved March 3, 1871, and entitled "An Act to incorporate the Texas Pacific Railway Company and to aid in the construction of its road, and for other purposes", together with all and singular the tenements, hereditaments and appurte-

nances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

"To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, its successors and assigns forever.

"In witness whereof the said party of the first part hath caused its corporate seal to be hereunto affixed, and these presents to be signed by its President and Secretary, the day and year first above written."

At the date of this assignment or conveyance, the New Orleans, Baton Rouge and Vicksburg Railroad Company had not complied with any of the conditions of the Land Grant Act, other than the filing of a map of the general route with the Department of the Interior, as above set forth.

The New Orleans Pacific Railroad Company was a railway company incorporated under the laws of Louisiana, with full authority to construct a road between the city of New Orleans and the city of Shreveport in the State of Louisiana, and after having obtained the assignment or conveyance from the New Orleans, Baton Rouge and Vicksburg Railroad Company, and the recognition of same by the Department of the Interior, it proceeded to construct its line of road from Shreveport by way of Alexandria and West Baton Rouge to White Castle, in Louisiana, it having already constructed or obtained, a line from White Castle to the City of New Orleans, making a continuous line from New Orleans to Shreveport. This line of road was within the limits of the land withdrawn for the New Orleans, Baton Rouge and Vicksburg Railroad Company.

Up to this date, and until the 20th day of June, 1881, The Texas and Pacific Railway Company had no connections whatever with any of the above transactions, or with any of the property involved in same. On the 20th day of June, 1881, The Texas and Pacific Railway Company purchased from the New Orleans Pacific Railroad Company its railway between the city of New Orleans and the city of Shreveport; the contract of purchase being in words and figures as follows:

"This indenture, made this 20th day of June, in the year of our Lord one thousand eight hundred and eighty one, by and between the New Orleans Pacific Railway Company, a corporation created by, and under the laws of the State of Louisiana, party of the first part, and the Texas & Pacific Railway Company, a corporation created by and under the laws of the United States, and having and owning certain franchises under the laws of Texas party of the second part:

Witnesseth, That the said party of the first part, for and in consideration of the sum of one hundred dollars, lawful money of the United States, to it in hand paid, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for the other and further consideration hereinafter to be mentioned, hath consolidated itself with the party of the second part under its own proper and corporate name of "The Texas & Pacific Railway Company", on the terms and conditions herein and hereby agreed upon, by granting, bargaining, selling, aliening, remising, releasing, conveying and confirming, and by these presents granting, bargaining, selling, aliening, remising, assigning, transferring, conveying and confirming unto the party of the second part, its successors or assigns, all the franchises, corporate rights or privileges of the

said party of the first part, together with its track, roadbed, buildings, rolling stock, engineers' tools, bonds, stocks, grants, privileges, property, real and personal, and every right, title and interest in and to any franchises, or property, real or personal, and all rights, of every name and kind, which the party of the first part has any right, privilege, or interest, situated and being in the State of Louisiana, or in the State of Texas, or elsewhere: The object and intent of this contract and agreement being to so merge the rights, powers and privileges of the party of the first part into the party of the second part, so that the party of the second part, under its own charter, corporate name and organization shall, without impairing any existing right, exercise in addition thereto, all the powers, rights, privileges and franchises, and own and control all the properties that the party of the first part now exercises and owns, or by its charter and by-laws it has the right to exercise, own or control.

Provided, however, that the land and land grants acquired or to be acquired by the party of the first part from the Government of the United States, either directly or indirectly, or from the State of Louisiana, or from the New Orleans, Baton Rouge and Vicksburg Railroad Company, or from any other source, other than lands necessary and needful for railway purposes, are expressly exempted and excluded from the provisions of this contract, and do not pass by any terms or provisions thereof.

And provided further, that the franchises of the party of the first part (to be and remain a corporation until such time as may hereafter be agreed upon for its dissolution) shall not be impaired or infringed upon by anything contained in this contract.

And provided, also, that nothing in this contract contained is intended to, or shall impair any legally existing contract by mortgage or otherwise, of the party of the first part.

The further consideration for this contract and agreement is, that the party of the second part shall receive from the party of the first part, or its shareholders, share for share of its capital stock of one hundred dollars per share, issued or to be issued (not exceeding the rate of twenty thousand dollars per mile, for 400 miles of road, which, it is estimated, will be constructed under the existing franchises of the party of the first part); that is to say: The party of the second part shall deliver to the party of the first part, or to such person as the latter shall direct, or to its stockholders, one share of its capital stock of one hundred dollars per share, for a like amount of the capital stock of the party of the first part now outstanding, when and as transferred to the party of the second part, and as further stock of the party of the first part is issued (not exceeding twenty thousand dollars per mile, as aforesaid) similar exchanges and transfers shall be made until all this stock of the party of the first part (not exceeding the rate per mile as aforesaid) shall have been issued.

Provided that the stock of the party of the first part received by the party of the second part in exchange, under this agreement, shall not be cancelled, but shall be held and used by the party of the second part, for the purpose of preserving to the said second party the enjoyment of all rights and privileges pertaining to the ownership thereof, until otherwise provided by authorized corporate action, the corporate existence of the party of the first part shall be maintained, and its power to carry out all existing contracts, and to mortgage any land grant it has acquired, or may acquire, from the New Orleans, Baton Rouge and Vicksburg Railroad Company, or otherwise, remain wholly unimpaired hereby.

In witness whereof, the parties aforesaid being the contracting parties of the first and second part, have mutually executed this in-

denture, under the corporate seals of the said companies, and attested by the signatures of the proper officers, the day and date above."

It is by virtue alone of the instrument of conveyance made by the New Orleans, Baton Rouge and Vicksburg Railroad Company to the New Orleans Pacific Railroad Company on the 5th day of January, 1881, that the New Orleans Pacific Railroad Company acquired any interest in the land grant of the Baton Rouge Company, or assumed any responsibility or liability, and the terms of that instrument fixed the responsibility and liability of the New Orleans Pacific Railroad Company, if any.

It is by virtue alone of the written instrument executed June 20, 1881, by the New Orleans Pacific Railroad Company to The Texas and Pacific Railway Company that The Texas and Pacific Railway Company acquired any rights in the Railroad of the New Orleans Pacific Company between New Orleans and Shreveport, and this instrument is the Texas and Pacific Railway Company's sole muniment of title as to said property, and this instrument alone fixes the liability or responsibility of the Texas and Pacific Railway Company as to any obligation growing out of said conveyance or growing out of its dealing with the property covered by said conveyance.

In the present cause of action the appellants are seeking to obtain a personal judgment against The Texas and Pacific Railway Company for the face amount of the thirty bonds alleged to be held by the plaintiff with the accrued interest thereon; these bonds, it is alleged, having been issued under mortgage dated September 4th, 1872. This is not a suit to foreclose the mortgage securing said bonds, nor is there any allegation or attempt to enforce the

said mortgage lien in any way. It is not contended that The Texas and Pacific Railway Company was a party to any transaction with the New Orleans, Baton Rouge and Vicksburg Railroad Company either in the issuance of the said bonds or the mortgage securing same. There is no evidence that The Texas and Pacific Railway Company entered into any agreement with the New Orleans Pacific Railway Company except as shown by document of date of June 20th, 1881, above set forth, and this document is clear and express in its terms, and does not in any wise obligate The Texas and Pacific Railway Company to assume any obligation of the New Orleans Pacific Railroad Company or any obligation of the New Orleans, Baton Rouge and Vicksburg Railroad Company, nor does the conveyance or assignment made to the New Orleans Pacific Railway Company of date January 5th, 1881, by the New Orleans, Baton Rouge and Vicksburg Railroad Company obligate the New Orleans Pacific Railroad Company to assume any of the indebtedness incurred or to be incurred by the New Orleans, Baton Rouge and Vicksburg Railroad Company.

Complainants in their bill are undertaking to fix liability upon The Texas and Pacific for the amount of the thirty year bonds and accrued interest by some sort of mythical trust which they allege grows out of the above transactions.

The complainants herein are not undertaking to foreclose the mortgage given by the New Orleans, Baton Rouge and Vicksburg Railroad Company to the Union Trust Company to secure said bonds. If the complainants have any interest in the property covered by the said mortgage, it is only the interest of a lien-holder. Their debt has not been reduced

to judgment as against the original payor, nor have they obtained any rights in the property securing said debt other than the lien of said mortgage.

Since the execution of the Agreement of June 20th, 1881, between the New Orleans Pacific Railroad Company and The Texas and Pacific Railway Company, conveying the railroad of the New Orleans Pacific Railroad Company to The Texas and Pacific Railway Company, The Texas and Pacific Railway Company has been in open and notorious possession of the railroad, operating the same as its own, paying taxes upon same, making extensive and valuable improvements upon same, and is now and at the date of the filing of this suit in possession of same, claiming it adversely as against the world.

At the date of the execution of the mortgage by the New Orleans, Baton Rouge and Vicksburg Railroad Company on the 4th of September, 1872, there was no railroad constructed nor was the construction of any railroad commenced by the Baton Rouge Company.

On the date the New Orleans Pacific Railroad Company acquired the Land Grant of the New Orleans, Baton Rouge and Vicksburg Railroad Company, no road had been constructed or commenced by the New Orleans, Baton Rouge and Vicksburg Railroad Company. Since the acquiring of the property by the New Orleans Pacific Railway Company in January, 1881, and by The Texas and Pacific Railway Company from the New Orleans Pacific Railway Company in June, 1881, a railroad has been completed along the original route and is now in full operation, owned, controlled and managed by The Texas and Pacific Rail-

way Company who have never in any manner recognized the validity of the mortgage issued by the New Orleans, Baton Rouge and Vicksburg Railroad Company in 1872, nor has The Texas and Pacific Railway Company ever assumed any obligation under said mortgage.

No interest has been paid upon the bonds covered by the mortgage issued by the New Orleans, Baton Rouge and Vicksburg Railroad Company in 1872. No demand appears to have been made upon the Trustee, to enforce the provisions of said mortgage for the non-payment of interest. The bonds secured by said mortgage matured according to their face on the first day of September, 1902, and according to the evidence of one of the complainants herein, these bonds were owned by his father about seven or eight years before his death, that his father died December 7th, 1893. The Bill of Complaint in this cause was filed on the 6th day of May, 1913, and no reason is given as to why the father of the complainants herein did not institute suit upon this obligation during his lifetime, nor is any reason given or any fact stated as to why the complainants herein did not institute suit on this obligation until after a period of more than ten years after the maturity of the bonds.

These are the undisputed facts in the case, and although there is a mass of *ex-parte* affidavits, and various letters between individuals and the Department of the Interior concerning the New Orleans, Baton Rouge and Vicksburg Railroad Company's Land Grant, The Texas and Pacific Railway Company is in no wise identified with any of this correspondence, it all being prior to the date The Texas and Pacific Railway Company acquired any interest in the New Orleans Pacific Railroad Company.

It is undisputed that The Texas and Pacific Railway Company ever acquired the New Orleans, Baton Rouge and Vicksburg Railroad Company by any instrument of writing, or by any verbal agreement, or any rights or interest in the franchises of said Railroad, and unquestionably it did not acquire any of the physical properties in the way of a railroad, for the reason that the New Orleans, Baton Rouge and Vicksburg Railroad Company never had any physical properties in the way of a railroad that could be acquired, it never having undertaken to construct a railroad of any kind, and never having located a right of way for a railroad, it had none.

We submit that appellants have cast their case in a very peculiar mould. They are seeking no rights as against The New Orleans, Baton Rouge and Vicksburg Railroad Company, nor as against any of the stockholders of that Company; they are seeking no rights as against the New Orleans Pacific Railroad Company, nor any of the stockholders of that Company. They are not undertaking to obtain a foreclosure of the mortgage of the New Orleans, Baton Rouge and Vicksburg Railroad Company mortgage of 1872, nor are they seeking to subject any of the land grants which they allege was covered by that mortgage to the lien of their alleged mortgage. On the contrary they are seeking a personal judgment against The Texas and Pacific Railway Company, a party who had no connection with the New Orleans, Baton Rouge and Vicksburg Railroad Company mortgage of 1872, no interest in the land grants alleged to be covered by said mortgage and no interest in any of the transactions as between the New Orleans, Baton Rouge

and Vicksburg road and the New Orleans Pacific Railroad.

After waiting for more than forty years after the date of the mortgage and more than eleven years after the maturity of the bonds secured by said mortgage and for more than forty years after the first installment of interest matured on the bonds secured by said mortgage, they do not even proceed against the original maker of the bonds or against the lands alleged to be covered by said mortgage, but proceed against an utter stranger to all of the transactions and seek a personal judgment based upon some mythical trust that in my opinion is unknown to the law. A stronger case of want of diligence and want of conscience, and want of equity could not be presented to the Court.

At the date the New Orleans, Baton Rouge and Vicksburg Railroad Company mortgage was executed, the Baton Rouge Company had done absolutely nothing to acquire the Land Grants. It never performed any of the conditions precedent to the obtaining of the Land Grants. It merely had a floating interest or right to obtain the Land grants, conditioned upon its doing certain things. Until those things were performed by it, no right or title could be vested in it as to the Land Grants.

The mortgagees in the Baton Rouge Mortgage could acquire no greater rights than the Baton Rouge Company could acquire. The Baton Rouge Company having failed to perform the conditions required of it, those rights were forfeited to the Government and were assigned to the New Orleans Pacific Railway Company in the place and stead of the New Orleans, Baton Rouge and Vicksburg Railroad Company, and the New Orleans Pacific

Company performed the conditions that should have been performed by the New Orleans, Baton Rouge and Vicksburg Railroad Company. The mortgagees in the New Orleans, Baton Rouge and Vicksburg Railroad Company mortgage never acquired anything as there was nothing for them to acquire.

The Texas and Pacific Railway Company never acquired any interest in the Land Grants, never assumed any of the obligations of the New Orleans Pacific Railway Company in connection with the land grants, never assumed any of the obligations of the New Orleans, Baton Rouge and Vicksburg Railroad Company, and the only foundation upon which the complainants could in any wise predicate liability upon the part of the Texas and Pacific Railway Company is the fact that it acquired a Railroad between New Orleans and Shreveport which operated in the general direction that a line of road would have been operated had the Baton Rouge Company carried out its agreement with the Government.

The Texas and Pacific Railway Company has spent millions of dollars on this property, has operated it, claiming it adversely as against the world. Its operations has been open and notorious. No demand has ever been made upon it prior to the institution of this suit for the payment of either interest or principal of the New Orleans, Baton Rouge and Vicksburg Railroad Company bonds issued in 1872. No explanation is given or undertaken to be given by the complainants as to why they delayed bringing this suit for such a great period of time, and why demand has not been made upon the Trustee to bring this suit or why suit had

not been instituted by them for defaulting installments of interest. The complainants in this case have not only slept upon their rights but to use a stronger term have hibernated upon their rights. In seeking to put in motion the machinery of a Court of Equity they do so with unclean hands. In asking a Court of Equity to engraft a trust upon transactions that happened forty years ago and more than thirteen years after every possible obligation had matured; when the status of parties had changed; when property that did not really exist in the New Orleans, Baton Rouge and Vicksburg Railroad Company had become worth millions of dollars in the hands of The Texas and Pacific Railway Company with other securities issued against it, they are not in a position to invoke the activity of a Court of Equity, to disturb such conditions, or open up transactions that have long since been closed. They have slumbered too long and their hands are not clean.

No allegation of fraud and no evidence of fraud upon the part of The Texas and Pacific Railway Company is charged or established. No suppression of facts are shown in the Record. Every transaction on the part of The Texas and Pacific Railway Company in connection with its line of road between New Orleans and Shreveport was open; its status established by instruments of writing which were duly recorded in accordance with the laws of the States through which the road operates; the possession of the Texas and Pacific Railway Company has been open and notorious; its conduct in connection with the property has been clean; and yet in the face of these facts, complainants seek to put the machinery of a Court of Equity in motion

to disturb all these conditions without any allegations or evidence of good faith to excuse their neglect to assert whatever rights they may have had years before.

And the learned Circuit Court and the learned District Court were prompted by these very facts in holding that the complainants had been guilty of such gross laches that their cause of action could not be maintained.

The maxim in Equity of "*Vigilantibus non dormientibus æquitas subvenit*" could not be invoked in a stronger cause, and we respectfully ask that this bill be dismissed.

THOMAS J. FREEMAN,
Counsel for the Appellee The Texas
and Pacific Railway Company,
New Orleans, La.

18



WALLER ET AL., TRUSTEES (UNDER THE LAST
WILL AND TESTAMENT) OF WALLER, *v.* TEXAS
& PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

No. 92. Argued December 17, 1917.—Decided January 7, 1918.

Plaintiffs, as testamentary trustees, sought to hold the Texas & Pacific Railway Company, as by an express trust, for the satisfaction of certain bonds, part of an issue made under a deed of trust, in 1872, by the New Orleans, Baton Rouge & Vicksburg Railway Company. The deed purported to cover the right of way and aid lands, then unearned, which had been granted to that company by § 22 of the act creating the Texas & Pacific (Act of March 3, 1871, c. 122, 16 Stat. 573); and the contention, generally stated, was that the Texas & Pacific, by succession to the benefits of the grant through a quit-claim made by the grantee, in 1881, to an intervening company, by construction of the railroad by that company and by a practical merger with it in that year, had become directly and expressly liable—this in view of the terms of the deed of trust, of the act of Congress and the instrument of consolidation, and the circumstances attending the transactions. When the suit began, in 1913, the bonds were more than 10 years overdue, and interest had been in default since 1876, or longer; the railroad had been owned and operated by the Texas & Pacific since the merger; the aid lands had been held, mortgaged and otherwise dealt with as the property of the intervening company, subject to the merger agreement, and the validity of the deed of trust of 1872 had been challenged in 1890, and denied by a decree taken *pro confesso* against the trustee, which, however, the plaintiffs here claimed was collusive, and not binding, and not applicable to the right of way. The bonds in suit were owned by plaintiffs' decedent for seven or eight years before his death, but whether he was an original holder or purchaser did not appear, nor was there any evidence concerning his notice or knowledge. *Held*, without deciding the merits, that the suit, begun in 1913, was barred by laches. For even if it be assumed that under the deed of trust an action could not have been maintained for the interest until the bonds matured in 1902, yet no attempt was

398.

Statement of the Case.

made to avail of a provision for the taking of possession by the trustee, at request of any bondholder, for default of interest; and furthermore the court may neither suppose nor indulge an ignorance of the open activities of the companies and the long possession and operation of the railroad by the defendant. *Held*, further, that the fact that the defendant had itself paid off most of the bonds issued with plaintiffs' was immaterial in the absence of the reasons for so doing; and that, in view of the magnitude of the recovery sought (more than \$100,000) and the long claim and operation of the property and expenditures upon it, the delay could not be excused upon the assumption that defendant's position had not changed since 1881, when its liability, if any, accrued.

229 Fed. Rep. 87, affirmed.

SUIT to compel payment of thirty bonds issued by the New Orleans, Baton Rouge & Vicksburg Railroad Company under the circumstances hereinafter detailed. It was originally brought against appellee and the New Orleans Pacific Railroad Company and the Union Trust Company of New York. The latter company was dismissed from the suit. No process was issued against the New Orleans Pacific Railroad Company.

The bill presents the jurisdictional qualification of the parties and the following facts, which we state narratively:

The New Orleans, Baton Rouge & Vicksburg Railroad Company, which we shall refer to as the Baton Rouge Company, was incorporated December 30, 1869, by a special act of the Louisiana legislature and was given the usual powers to execute the purpose of its incorporation, to borrow money and issue bonds, etc., and secure their payment by a mortgage of its stock and franchises and property which it then owned or might thereafter acquire.

The Texas & Pacific Railway Company, herein referred to as the Texas & Pacific Company, was incorporated March 3, 1871, by an Act of Congress (16 Stat. 573, c. 122), and was granted certain lands to aid in the construction of its road; and by a section of the act (§ 22) a grant was made to the Baton Rouge Company of the

same kind, that is, alternate sections of public lands per mile, in the State of Louisiana, upon the condition that the company complete the whole of the road within five years of the passage of the act, the lands to be selected on each side of its road on a route to be selected by the company to connect with the Texas Pacific at the eastern terminus of the latter, through the public land from New Orleans to Baton Rouge and thence by the way of Alexandria. The company was empowered to mortgage the lands.

September 4, 1872, it exercised the power and executed a mortgage or deed of trust to the Union Trust Company of New York, transferring and conveying, among other things, all of its railroad and personal property and all the right, title and interest it then had or it or its successors might acquire to the granted lands. The trust company accepted of record its trusteeship.

The mortgage was intended to secure 12,000 bonds of \$1000 each, payable September 1, 1902, with interest at 7%, payable semiannually; 1,250 of the bonds were issued and certified by the trustee.

Complainants, as executors and trustees of the estate under the will of David J. Waller, who died in 1893, are the owners and holders before maturity of 30 of the bonds with 52 coupons attached thereto.

It was covenanted in the mortgage by the trustee thereof that a sinking fund should be established and maintained and an amount equal to 1% of the company's gross earnings, after certain deductions, and the proceeds of the sales of the granted lands should be paid to the trustee for the fund for the benefit of the bondholders. The mortgage was duly recorded.

The railroad company accepted the grant and filed a map of its general route from Baton Rouge to Shreveport and a like map showing the general route from New Orleans to Baton Rouge. The lands were then withdrawn

398.

Statement of the Case.

from entry and sale by the order of the Secretary of the Interior. And under the terms of the grant the lands vested in the company, subject only to the construction of the road.

January 5, 1881, the Baton Rouge Company, by deed of quitclaim, conveyed the lands to the New Orleans Pacific Railroad Company, referred to herein as the New Orleans Company, and its successors and assigns, and thereafter the Baton Rouge Company no longer maintained its separate corporate existence and became merged and consolidated with the New Orleans Company.

The conveyance and acceptance were filed by the New Orleans Company in the Interior Department and the Secretary of the Interior, under an opinion of the Attorney General of the United States, recognized the New Orleans Company and that the Baton Rouge Company had title to the lands and could sell and assign the same.

On March 13, 1883, the Secretary of the Interior transmitted to the President a report of the examination of 260 miles of the road and recommended that they be accepted and that patents be issued for such lands as might have been earned by their construction by the New Orleans Company, as assignee of the Baton Rouge Company, the mortgagor thereof. The recommendation was approved and patents were issued to the New Orleans Company, but solely as the assignee of the Baton Rouge Company and as its grantee for 679,284.64 acres of lands in Louisiana. The foregoing state of facts in respect to the title of the lands was determined and adjudged in *New Orleans Pacific Ry. Co. v. United States*, 124 U. S. 124.

By an Act of Congress of February 8, 1887, c. 120, 24 Stat. 391, all lands which were not forfeited thereby were relinquished, granted, conveyed and confirmed to the New Orleans Company as assignee of Baton Rouge Company by the transfer above stated and title confirmed to

approximately 746,954 acres within the grant to the Baton Rouge Company. At this time the New Orleans Company was and now is consolidated with and merged into the Texas & Pacific Company.

Within six months after the conveyance to it by the Baton Rouge Company the New Orleans Company transferred all of its property to the Texas & Pacific Company, with the object and intention to merge the former with the latter under the latter's name. The land grant acquired by the former company was expressly reserved and its corporate organization was to be continued and maintained until further authorized corporate action. In addition to the lands patented to the amount of 679,284.64 acres to the New Orleans Company as assignee of the Baton Rouge Company, other lands have been patented to it amounting in 1917 to 1,001,000 acres, and the New Orleans Company has since procured further patents and filed applications for additional lands and still continues to do so. The records of the Secretary of the Interior show that there is a balance still due of more than 1,000,000 acres.

By the act incorporating the Texas & Pacific Company (1871) it was provided that the property and franchises acquired from each consolidated or purchased railroad company or companies should vest and become absolutely the property of the Texas & Pacific Company, subject, however, to all of the debts and obligations of the acquired company or companies, and that the consolidation should not impair any lien which might exist on any railroads so consolidated. It was provided that there should be no consolidation with any competing road and that the contracts and obligations of railroads consolidated should be liens upon the Texas & Pacific Company.

From about the time of the organization of the New Orleans Company, the Texas & Pacific Company con-

398.

Statement of the Case.

trolled it and still controls it, and by the recited acts and transfers became charged with the lien of the mortgage by the Baton Rouge Company to the Union Trust Company (September 4, 1872) and the other obligations of the New Orleans Company, particularly the performance of the covenants in the mortgage and the payment of the bonds secured thereby. The organization of the companies and merger in the Texas & Pacific Company and transfer of the lands granted were all a part of a scheme to secure from the United States the grant for the purpose of raising money thereon by mortgages, and bonds secured thereby, to construct and equip a transcontinental railway from New Orleans to the Pacific, as appears from the act incorporating the Texas & Pacific Company (Act of March 3, 1871).

The lands patented in the name of the New Orleans Company were appropriated by the Texas & Pacific Company, it continuing the other company in name for the sole purpose of receiving patents, and controlling its corporate books, accounts and records, the New Orleans Company maintaining no corporate existence and having no officers or directors (this on information and belief), and the Texas & Pacific, in violation of the terms of the covenants of the mortgage by the Baton Rouge Company to the Union Trust Company and the trust thereby created, has diverted the proceeds of the lands granted from the use and purpose of the mortgage and in fraud of complainants and the holders of bonds secured by the mortgage to its own use and to the use of the New Orleans Company and to other uses not authorized by the deed of trust. The persons to whom the sales of the lands have been made are so many that it is wholly impracticable to enforce the lien of the mortgage, and have by occupation under the color of title acquired an impregnable title thereto.

The Union Trust Company and certain bondholders

were made parties defendant in an action brought against the Baton Rouge Company by the trustees under deeds of trust of April 17, 1883, and January 5, 1884, executed by the New Orleans Company, to declare them first liens upon the lands described therein and to secure an issue of bonds authorized thereby, and asking for judgment that the deed of trust from the Baton Rouge Company to the Union Trust Company (September 4, 1872) did not affect or give any lien in or to the lands and that the same be canceled. A decree *pro confesso* was entered so declaring and adjudging.

The bondholders were dismissed from the case. The attorneys for the complainants were attorneys for the New Orleans Company and the Union Trust Company. There were false allegations in the bill and the Union Trust Company, though in duty bound as trustee to defend the action and the trust created by the mortgage, failed to do so, permitted the destruction of the lien and permitted the New Orleans Company and the Texas & Pacific Company to appropriate to themselves or to other purposes the proceeds of the sales of the lands which were at least worth \$5.00 per acre.

The subject-matter of the suit exceeds \$3,000 and the complainants are without remedy at law.

Discovery is prayed of the quantity of lands patented, the amount of sales and the proceeds whereof and that the Union Trust Company and the Texas & Pacific Company account to complainants and to all other bondholders similarly situated for all money and property received from the enjoyment and sales of the lands to the extent of their bonds and coupons and that they be adjudged to pay complainants the amounts found due them.

The answer of the Texas & Pacific Company qualified or denied certain of the averments of the bill and admitted others. It set up the various acts of Congress referred to in the bill and the transactions between the Texas &

Pacific Company and the New Orleans Company, but assigned a different cause and effect to them and to the acts of Congress and to what was done under them. Its defenses may be concentrated in four propositions stated by counsel:

"1. That the Baton Rouge Company never acquired title to the land grant lands, and that its alleged mortgage of September 4, 1872, never became operative as a lien thereon.

"2. That prosecution of the action is barred by the decree of the Circuit Court of the United States for the Eastern District of Louisiana in the suit of Dillon and Alexander against the New Orleans Pacific Railway Company and others.

"3. That the Texas and Pacific Railway Company is in no way connected with the land grant or the transactions referred to in the complaint.

"4. That the suit is barred by limitations and by the laches of the complainants."

Upon the issues thus formed, if it can be said there are issues upon anything else but the characterization and legal effect of the acts of Congress, the instruments referred to and the transactions detailed, the District Court expressed opinion that it was unable "to see how any express trust ever existed in plaintiff's favor or in favor of his decedent, except that created by the mortgage to the Union Trust Company as trustee, the bounds and limitations of which are set forth in the deed itself," which instrument, the court said, was "in effect nothing more or less than a mortgage, and to be treated as such." The mortgage and debt, therefore, the court said, might be enforced against the property at the *situs* of the latter, but by this suit, the court said further, it was sought to enforce the collection of the debt not from the property mortgaged but from another corporation now alleged to be personally liable for it. Such liability, the court

continued, could only result from some trust *ex delicto* to be implied from some state of fact shown, and not upon any direct undertaking by the New Orleans Company or the Texas & Pacific Company to pay the debt of another, to-wit, the Baton Rouge Company. Therefore, the court concluded that its decision must turn upon either one or both of the affirmative defenses made by the Texas & Pacific Company, that is, either the statute of limitations or laches, or both.

Reciting that the bonds matured September 4, 1902, and this suit was commenced May 7, 1913, the court finally applied the statute of limitations of ten years according to the law of New York and Louisiana. It, however, expressed the view that the defense of laches should be sustained and referred to *O'Brien v. Wheelock*, 184 U. S. 493, and dismissed the bill.

The Court of Appeals affirmed the District Court, but rested its decision upon the defense of laches, citing therefor *O'Brien v. Wheelock*, *supra*, and saying: "The proposition is somewhat startling that the holder of the obligations of one corporation secured by a mortgage on its property may maintain a suit forty years after the date of such obligation and based thereon against another corporation not a party thereto."

Mr. Jesse C. Adkins, with whom *Mr. David Bennett King*, *Mr. W. Russell Osborn*, *Mr. William A. Milliken*, *Mr. C. C. Calhoun* and *Mr. Daniel B. Henderson* were on the briefs, for appellants.

Mr. Thomas J. Freeman for appellee.

MR. JUSTICE MCKENNA, after stating the case as above, delivered the opinion of the court.

To establish a trust against the Texas & Pacific Company it is argued that the purpose of the Act of Congress

of 1871 was to provide for the construction of a trans-continental railroad from Texas to San Diego, California, and from thence to San Francisco by another company, and that the Baton Rouge Company, the New Orleans Company and principally the Texas & Pacific Company were instruments of that purpose; and the grant of the Baton Rouge Company, by its mortgage to the Union Trust Company, became charged with a lien for the payment of the bonds issued by the railroad company, which lien followed the conveyance of the lands to the New Orleans Company and to the Texas & Pacific Company; and that besides there was a personal trust first in the Union Trust Company and successively in the other companies. And the argument is attempted to be fortified by § 4 of the Act of Congress of 1871 which authorized the Texas & Pacific Company to acquire other railroad corporations, and § 6, by which it was to become responsible for the debts or obligations of any company so acquired.

To sustain this contention the provisions of the various instruments are adduced and their requirements, especially that the bonds were entitled to the benefit and security of a sinking fund to be set apart for their redemption whereby the proceeds of all lands granted to the railroad company (the Baton Rouge Company) were to be applied to the payment of interest on the bonds and to their redemption and also 1% of the gross earnings of the company. And that the railroad and its equipment were mortgaged for like purposes and all "the lands and sections of lands situate, lying and being on either side of the said railroad, as the same may be finally located and constructed, in accordance with and as granted by the act of Congress" of March 3, 1871.

The mortgage to the Union Trust Company was in trust for the purposes expressed above, and it was provided that, if default should be made in payment of inter-

est or of any payment to the sinking fund and continue for the period of six months, or in default of any requirement of the mortgage, all of the bonds outstanding, at the option of the holders of a majority in interest of such outstanding bonds, should forthwith become due and payable. And further, upon written request of the holders of at least 1000 bonds then outstanding, the trustee should foreclose the equity of redemption of the property embraced in the hypothecation; and at the request of a bondholder might take possession of the road.

Sales of the lands were provided for and the disposition of the proceeds, any balance remaining to be appropriated to the purpose of the sinking fund. There was a covenant by the company to pay on June 1, 1880, and on the first of June of each succeeding year, a sum which should equal one percentum of the gross earnings received by the road from its operation twelve months immediately preceding, which sum should be applied by the Trust Company or its successors to the redemption of the bonds, and that the Trust Company on the first days of January and July of each and every year should designate by lot for redemption a number of bonds sufficient to equal, as near as might be, the accumulations of the sinking fund and cause a notice to be printed of such purpose.

It is contended that by reason of these provisions and the facts detailed a trust was created that followed the lands to whosoever hands they reached, and each possessor of them became a trustee and bound with respect to the property to the execution of the trust in the same manner as the original trustee, the Union Trust Company, was, citing for this result *Ketchum v. City of St. Louis*, 101 U. S. 306.

And by virtue of this principle the New Orleans Company is declared to have been a trustee and the lands granted to it subject to the execution of the trust and the Texas & Pacific Company has also become a trustee.

Another ground of liability is asserted against the latter company. It has been consolidated, the contention is, with the New Orleans Company and the latter has disappeared from sight and significance, leaving the Texas & Pacific in sole responsibility. And yet the instrument of consolidation expressly excepts "the lands and the land grants acquired or to be acquired" by the New Orleans Company from the United States, the State of Louisiana or the Baton Rouge Company, or from any other source, other than lands necessary or needful for railway purposes. There is an express exemption and exclusion of such from the provisions of the instrument of consolidation. And it was provided that the corporate existence of the New Orleans Company should be maintained and its power to carry out the existing contracts and to mortgage any land grant it had acquired or might acquire from the Baton Rouge Company or otherwise should remain unimpaired.

There is, therefore, some ground for the contention of the Texas & Pacific Company that there is a want of that privity of property which, according to the insistence of appellant, is necessary to make that company trustee of the Baton Rouge Company's mortgage of 1872, and that §§ 4 and 6 of the act incorporating the Texas & Pacific Company have not the meaning ascribed to them. And further that the Baton Rouge Company never acquired any lands to which a lien could attach and that the asserted trust had nothing upon which it could be exercised, neither lands to sell nor railroad to take possession of and operate, both of which—sale of lands and operation of road—were necessary to the execution of the trust; and that it was so determined in a suit against proper parties by the decree of the Circuit Court of the United States for the Eastern District of Louisiana.

To this contention complainants reply: (1) The decree was collusively obtained, (2) It did not cover the right

of way and roadbed which, it is said, is admitted to have come to the Texas and Pacific Company from the New Orleans Company, (3) Independently of the deed of trust and irrespective of it, the arrangement between those companies was an attempt to conserve the subordinate rights and interests of the stockholders of the Baton Rouge Company at the expense of its creditors; an attempt, it is insisted, always judicially condemned. Cases are cited, among others, *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482.

The argument to sustain or oppose the respective contentions we need not recite. They have indication in the pleadings and, it may be, in what we have already said. We rest our decision on the defense of laches which, we think, has been sustained.

In 1872 the Baton Rouge Company executed the instrument the particular trusts of which are now attempted to be enforced. Before that time it had filed a map of general route but no map of definite location; but after that time the record discloses nothing done by it until 1881, when it conveyed the lands to the New Orleans Company.

The activities of the New Orleans Company are shown, and through and by what struggles it was enabled to construct the road. The record shows assertion of rights by some of the bondholders, but also shows that the assertion was met by challenge of legality and judicially determined against. During all that time, during all of the notoriety of the transactions detailed, the owner or owners of the bonds in suit made no claim by word or act and now, over ten years after their maturity and forty years after their issue, a claim of personal liability is made against the Texas & Pacific Company. It is to be borne in mind that the interest on the bonds has always been in default, certainly since 1876, and there was remedy provided for such default. At the instance of

398.

Opinion of the Court.

any holder of the bonds the trustee could have taken possession of the road and if of the Baton Rouge Road then of its successors in liability, the New Orleans and the Texas & Pacific companies, for if they were successors in liability they were successively subject to the remedy. If it be said that such remedy was extreme and inconvenient, it had potency as a threat in the hands of a diligent creditor, and, besides, if there was a successive personal liability it accrued against the New Orleans Company in 1881 and the Texas & Pacific Company in 1881.

The delay is attempted to be excused. It is said action for nonpayment of interest could only be taken by the holders of 1000 or a majority of bonds outstanding, and that it appears the Texas & Pacific Company had acquired 1183 of the 1275 bonds which were outstanding. It is hence contended that complainants' testate could not have been guilty of laches before his death and that the present complainants could not act until the maturity of the bonds in 1902. It is further said that complainants filed a bill in 1908 in the United States District Court in Louisiana to collect the bonds and that until the filing of the answer in that case complainants were ignorant of the merger of the New Orleans and the Texas & Pacific companies or of the suit filed in 1890 to remove the cloud of the asserted lien of the mortgage of the Baton Rouge Company to the Union Trust Company of 1872.

But what complainants' testate knew does not appear and whether he was an original holder or a purchaser, except that it was thought he owned the bonds for seven or eight years before his death. And the ignorance of complainants is extraordinary in view of their interest, if it was an attentive interest. If we may suppose ignorance of records we cannot suppose, certainly not indulge, an ignorance of the open activities of the companies and the possession and operation of the railroad by the Texas & Pacific Company.

It is again said in excuse that it does not appear that the Texas & Pacific Company has changed its position, which it is said is the same as it was in 1881, and that it has even realized the benefit of the trust and so far executed it as to pay before 1890 most of the bonds. Why those bonds were paid or acquired and upon what motive does not appear, and it cannot be said that a company, which has been in possession of and operating a great property for many years, having spent large sums of money upon it, in the belief of having a clear and unincumbered right, is inequitably unaffected by a claim against it, asserted as a result of remote transactions with which it had no connection. And certainly it may be urged that it would surprise and strain any condition to be suddenly called upon to pay \$107,700.00, that sum being the amount of principal and interest (7%) of complainants' demand.

Decree affirmed.